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n175. See Dewey, supra note 1, at 33.

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The view of experience as not only made up of present choices, but constitutive of our future selves, is most vividly set forth in the tradition of American pragmatism, n176 beginning with great independent thinkers such as Jefferson, Lincoln, and Emerson, reaching its height in the works of Dewey, James, and Pierce, and continuing today as a common underpinning to the divergent work of Seyla Benhabib, Richard Rorty and Cornel West. In the legal academia such diverse scholars as Daniel Farber, Richard Posner, Martha Nussbaum, J.M. Balkin, Stanley Fish and Drucilla Cornell invoke the tools of pragmatism. n177 Though much separates these thinkers, they notably share a preference for "shaping the future [compared] to maintaining continuity with the past." n178 [*136] They also share an adherence to the belief that "a fallibilist theory of knowledge emphasizes, as preconditions to the growth of scientific and other forms of knowledge, the continual testing and retesting of accepted "truths,' the constant kicking over of sacred cows - in short, a commitment to robust and free-wheeling inquiry ...." n179 This philosophy is disruptive to traditional modes of thinking within legal institutions. Judge Posner artfully explains that:

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n176. Pragmatism, though largely an American phenomenon, by definition is open-ended and susceptible to a broad range of influence. Among non-Americans often identified as pragmatists or as important to the pragmatist tradition, are Wittgenstein, Habermas, Nietzche, and Bentham. See generally Cornel West, The American Evasion of Philosophy: A Genealogy of Pragmatism 4 (1989) ("charting the emergence, development, decline and resurgence of American pragmatism"); Sidney Hook, Pragmatism and the Tragic Sense of Life (1974) (collection of essays about pragmatism).

n177. See, e.g., Fish, Speech, supra note 5 (discussing the pragmatic jurisprudence of Richard Posner, Richard Rorty, and Ronald Dworkin); Posner, supra note 25 (arguing that "American law really is, and also should be, pragmatic, and that it can be improved by greater awareness of its pragmatic character); J.M. Balkin, Transcendental Deconstruction, Transcendent Justice, 92 Mich. L. Rev. 1131 (1994) (discussing a pragmatic interpretation of essays written by Jacques Derrida); Cornell, Ethics, supra note 59 (discussing pragmatism in the context of Roberto Unger's view of liberalism); Daniel Farber, Reinventing Brandeis: Legal Pragmatism for the Twenty-First Century, U. Ill. L. Rev. 163, 164 (1995) (asserting that the examples set by Justice Brandeis "can teach much about how legal pragmatism can be translated from jurisprudence to practice"); Martha C. Nussbaum, Skepticism About Practical Reason in Literature and the Law, 107 Harv. L. Rev. 714, 717 (1994) (using ancient-modern analogy and asserting that ancient skepticism, rather than modern skepticism, is similar to "several kinds of modern anti-normative arguments, or pragmatism").

n178. Posner, supra note 25, at 28. Judge Posner also notes that pragmatism, properly understood, is an attitude rather than a dogma. Quoting Professor West, Posner describes pragmatism as "an attitude whose "common denominator' is "a future-oriented' instrumentalism that tries to deploy thought as a weapon to enable more effective action." Id.

n179. Id. at 466.

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Although American lawyers have made significant contributions to the theory of free speech, their attitude toward law itself is pious and reverential rather than inquiring and challenging. Law is not a sacred text, however, but a usually humdrum social practice vaguely bounded by ethical and political convictions. The soundness of legal interpretations and other legal propositions is best gauged, therefore, by an examination of their consequences in the world of fact .... There is a tendency in law to look backward rather than forward - to search for essences rather than to embrace the experiential flux. n180

The challenge posed by pragmatism is to recognize the extent to which the past, as represented by the present, implicates the future.

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n180. Id. at 467-68.

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John Dewey acknowledged the profound constructedness of pragmatism when he noted that "society not only continues to exist by transmission, by communication, but it may fairly be said to exist in transmission, in communication." n181 Community building occurs through a process of communication that results in shared aims, beliefs, aspirations and knowledge. n182 According to Dewey, this process must ensure participation in a common understanding, in such a way as to secure a common manner of responding to expectations. In this way, communication is always instructive, both for the recipient and for the one communicating an experience. Communication is educational because to communicate one must formulate an experience: "to formulate requires getting outside of it, seeing it as another would see it, considering what points of contact it has with the life of another so that it may [*137] be got into such form that he can appreciate its meaning." n183 In the end, the process of community building through communication not only educates, but "creates responsibility for accuracy and vividness of statement and thought." n184

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n181. John Dewey, Democracy and Education: An Introduction to the Philosophy of Education 4 (Free Press Paperback ed. 1966).

n182. See id.

n183. Id. at 5-6.

n184. Id. at 6.

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This last phrase bears strong similarities to the "ideal speech situation" propounded by Habermas n185 insofar as it shows a lack of concern for metaphysical inquiry, and a pronounced bias for participatory equality in an experientially inclined democracy. n186 Reformulated less abstractly, Dewey's belief in the force of experience leads one to inquire about the communities which are confined, if not in spirit, then in fact. The fortress domesticity currently holding sway in large segments of society marginalizes narratives by removing them from the mix that will eventually culminate in a set of shared values, assumptions, and methods for extracting these norms from experience. n187 Society is undermined by our practice of power and hegemony.

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n185. See Seyla Benhabib, Critique, Norm, and Utopia 285 (1986) (discussing Habermas' "ideal speech situation").

n186. While the notion of the ideal speech situation is useful as a regulative ideal, the efficacy of language as a heuristic tool is limited because it is intrinsically tied up in the operations of power within social practices. The analysis of language is useful for examining how narrative forms are produced and acquired, but should not be mistaken for or extend to a recrudescence of metaphysicality. See Stephanson, supra note 164, at 273-74.

n187. See Fish, Speech, supra note 5, at 103-04 (discussing how in traditional free speech theory the extirpation of narratives that fall outside the bounds of the dominant discourses is reinforced by the very primacy of those dominant values).

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Increasing residential polarization in our largest cities exacerbates the isolation of narrative structures. Empirical evidence shows that the systematic exclusion of minority populations from White neighborhoods and their attendant opportunity structures does not result from natural forces or individual preferences; rather discriminatory practices and racial perceptions impose and perpetuate our increasing residential and intellectual apartheid. n188 [*138] Isolation of minority communities in turn exacerbates the racial stereotypes that inform White decisions to flee urban centers for suburban enclaves of convenience and affluence. n189 Even though many minorities and Whites prefer more integrated neighborhoods, White practices, coupled with the greater mobility attendant to higher income levels, dictate residential segregation. n190 We have structured the market so that it is rational for nondiscriminatory actors to isolate poor minorities. All but the most progressive Whites are unwilling to risk the decrease in property values and in quality of services in order to live in an integrated community.

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n188. See Alex M. Johnson, Jr., How Race and Poverty Intersect to Prevent Integration: Destabilizing Race as a Vehicle to Integrate Neighborhoods, 143 U. Pa. L. Rev. 1595, 1612-14 (1995) (stating that past practices of overt discrimination produce the entrenched segregation prevalent in urban areas today); see also Douglas S. Massey & Nancy A. Denton, American Apartheid: Segregation and the Making of the Underclass, 160-61, 118-25 (1993) (stating that negative perceptions and associated phenomena such as racial "tipping,"

where White middle-class populations flee neighborhoods out of concern for property values and reduced quality of services when minority populations reach a certain level, explain the increasing severity of segregation to the point where some inner city residents live their entire lives without leaving the confines of their neighborhood, and explaining how segregation concentrates poverty in an endless downward spiral of economic and social isolation); Gary Orfield, Metropolitan School Desegregation: Impacts on Metropolitan Society, 80 Minn. L. Rev. 825, 866 (1996) (attributing White flight to a desire on the part of the White middle-class to avoid integrated schools).

n189. See John Charles Boger, The Urban Crisis: The Kerner Commission Report Revisited, 71 N.C. L. Rev. 1289, 1299 (1993) (noting that isolation also impacts minority students' self-perception and contributes to low achievement taking away any sense of "destiny control"); Martha R. Mahoney, Segregation, Whiteness, and Transformation, 143 U. Pa. L. Rev. 1659, 1659 (1995) (emphasizing that isolation from opportunity structures influences the construction of racial stereotypes).

n190. While Black preferences are largely for integrated neighborhoods, see John Charles Boger, Toward Ending Residential Segregation: A Fair Share Proposal for the Next Reconstruction, 71 N.C. L. Rev. 1573, 1577 (1993), White preferences are for minority populations of less than 20%, see Massey & Denton, supra note 188, at 93.

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Such experiential complacency stands in stark contrast to the spirit of experimentalism which characterized the thinking of early participatory democrats. In defending before Congress his policies of federally-sponsored internal improvements, Lincoln rejected a policy of "do nothing at all, lest you do something wrong." n191 He went on to chastise his opponents for focusing on the negative aspects of change, stating his viewpoint:

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n191. Lincoln on Democracy 38 (Mario M. Cuomo & Harold Holzer eds., 1990).

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the true rule, in determining to embrace, or reject any thing, is not whether it have any evil in it; but whether it have more of evil, than of good. There are few things wholly evil, or wholly good. Almost every thing, especially of governmental policy, is an inseparable compound of the two; so that our best judgment of the preponderance between them is continually demanded. n192

Lincoln was not promoting an aimless experimentalism. His belief in teleology, and the prospects of the American people, drove his vision of democracy. The famous phrase denoting the consent of the governed, "of the people, by the people, and for the people," was borrowed by Lincoln from his close friend, the minister Theo- [*139] dore Parker, whose brand of transcendentalism influenced Lincoln's brand of pragmatic democracy. n193 Parker's theology hinged on contrasting "the ideal Jesus with all the provisional expressions of that ideal in biblical texts or church doctrines." n194 Similarly, Parker's, and

Lincoln's, political theology held that the vision of the Declaration of Independence represented the ideal democracy, in contrast to provisional expressions of that ideal in the Constitution or the body politic. n195 This is the Lincoln Cornel West speaks of when he says: "Lincoln's profound wrestling with a deep sense of evil that fuels struggle for justice endeavors to hold at bay facile optimisms and paralyzing pessimisms by positing unique selves that fight other finite opponents rather than demonic foes." n196

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n192. Id. at 39.

n193. Garry Wills, Lincoln at Gettysburg: The Words That Remade America 106-08 (1992).

n194. Id. at 108.

n195. See id. at 108-10; cf. Adler, supra note 4, at 35-41 (discussing the ideals embodied in the Declaration of Independence).

n196. Cornel West, Keeping Faith: Philosophy and Race in America 108 (1993).

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Lincoln's conception of human agency and democratic possibility, maintaining a direct lineage to the Jeffersonian insistence on "the irreducibility of individuality within participatory communities," was a maneuver intended "to sidestep rapacious individualisms and authoritarian communitarianisms." n197 A maneuver intended, in other words, to mediate between variable conceptions of liberty as license and equality as imposition. Lincoln was not an idealist, and never believed that complete equality of existence could be achieved, or was even desirable, but he was a regulative idealist, believing that participatory equality was a procedural imperative to democracy. n198 In his political world, a pragmatic perspective warranted activism.

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n197. See id. at 107.

n198. See Wills, supra note 193, at 96-97.

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Lincoln's view - activism without idealism - foreshadowed the current recognition that even an ideal speech situation will always be distorted by power relationships. Contemporary pragmatists debate about the extent to which "unconstrained dialogue" and "discourse free from domination" are possible. n199 The need for such discourse stems from our aspiration of attaining ""a rationally motivated consensus' on controversial claims." n200 According to Habermas, 'conditions necessary to achieving a valid consensus of this type can be reduced to four: first, an equal opportunity to ini- [*140] tiate and continue communication; second, an equal chance to contribute and participate, as by making assertions and clarifying; third, an equal opportunity to express one's feelings and desires, intentions and motivations; and fourth, "the speakers must act as if in contexts of action there is an equal distribution

of chances "to order and resist orders, to promise and to refuse, to be accountable for one's conduct and to demand accountability from others.'" n201 The result of consensus reached under this suspension of "untruthfulness and duplicity on the one hand, and of inequality and subordination on the other" n202 would be an agreement that is dependent solely upon the force of the better argument. In other words, adherence to this set of rules may reduce the impact of power relations on the outcome of dialogue.

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n199. See, e.g., Benhabib, supra note 185, at 282-301.

n200. Id. at 284.

n201. Id. at 285 (translating a quote from J<um u>rgen Habermas, Wahrheitstheorien, in Wirklichkeit und Reflexion (H. Fahrenbach ed., 1973).

n202. Id.

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While not a panacea, Habermas' vision, as refined by Benhabib and others, works to expose the structures of speech situations and assists in reconstructing presuppositions attendant to argumentation and debate. Going further, we might also see the attempt to integrate constrained dialogue as a necessary first step in the pragmatic project of imaginatively experimenting with the possible reconstruction of democratic society. Roberto Unger notices that one weakness in Habermas' ideal is the assumption that certain beliefs are authoritative simply because they are likely to thrive in a modern democracy. n203 In his view, this merely continues the futile search for "a speculative simulacrum of impartiality of judgment," allowing us a provisional set of rules for doling out rights while leaving the structural presuppositions unchallenged. n204 As an alternative, Unger suggests "the working out, in imagination and practice, of institutional variations on the realization and reshaping of our interests and ideals." n205 This insistence on the provisional nature of structure is not radical, but mirrors one of the basic premises of nineteenth century pragmatism - that well-developed senses of experimentalism and fallibility were necessary to the success of the American experience.

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n203. See Roberto Mangabeira Unger, What Should Legal Analysis Become? 177 (1996).

n204. Id. at 182.

n205. Id.

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If our capacities stem from minimizing external constraints to full participation in the social environment, the continuing reformulation of particular social environments will become necessary. [*141] Dewey, providing a developed philosophical framework for Lincoln's observations, understood experience as having specific consequences for the future. n206

Experience for Dewey involves both an act and a passive reception of that act's consequence: "when an activity is continued into the undergoing of consequences, when the change made by action is reflected back into a change made in us, the mere flux is loaded with significance. We learn something." n207 In this understanding of education, the "unconscious influence of the environment" plays a significant role. The operations of our interpretive community establish the trajectory and ultimately delimit the parameters of our education. n208

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n206. See Dewey, supra note 181, at 140.

n207. Id. at 139.

n208. See Hilary Putnam, A Reconsideration of Deweyan Democracy, 63 S. Cal. L. Rev. 1671, 1687-88 (1990). Dewey conceived of democracy as an "empirical hypothesis" that ordinary people are capable of utilizing "social intelligence" to solve social problems. Id. A precondition to this conception of politics is an extirpation of the myopia caused by privilege and monopolistic access to critical institutions (those institutions which generate and define social values). In other words, participatory opportunity and a sense of ownership of one's lived reality are essential to the production of a genuine democracy.

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From the centrality of consequences and the contingency of truth springs the realization that all our opinions and beliefs have ethical consequences. Dewey argues that "an empiricism which is content with repeating facts already past has no place for possibility and for liberty." n209 The future has significance because human agency can make a difference - actions and opinions transform future aims and purposes. Belief in transformation and evolving notions of justice is an integral part of the American ideology, dating from Emerson to the present day. n210 Although that belief can be challenged by despair over the still remote approximation to the promise of authentic democracy, n211 pragmatism admonishes us to retain the belief that notions such as "justice" and "liberty" can be assessed through the actual, substantive results of the law.

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n209. John Dewey, Philosophy and Civilization 25 (1968). See West, supra note 196, at 111 (giving a summation of Dewey's pragmatism).

n210. See West, supra note 196, at 107.

n211. See Bell, supra note 63, at 373-75.

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III.

Liberty and Justice for All

Although analytical frameworks are indeterminate on an epistemological and metaphysical level, there are at least two ways in which our beliefs, opinions and actions are determinate. Josiah Royce, responding to the pragmatist axioms

of contingency and [*142] fallibility, suggested that "if any one wants to be in touch with the "Absolute' ... let [that person] simply do any individual deed whatever and then try to undo that deed .... Let the truths which that experience teaches any rational being show [that person] also what is meant by absolute truth." n212 In other words, the fact that our actions have ethical consequences imbues them with a sense of urgency, despite the fallibility of all facts and the contingency of all experience.

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n212. Josiah Royce, The Sources of Religious Insight 154 (1912).

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On a second, distinct level, Professors Sunstein and MacIntyre each make reference to the fact that pragmatic, contingent accounts of human possibility "seem[ ] inspired by the Enlightenment commitment to human liberation." n213 Any theory or philosophy is the product of individuals inescapably involved in the conflicts central to the development of their own community. The extent to which any set of narratives overlaps with those of another community may be said to speak to the resolution of common conflicts. n214 Thus any system can be said to attain determinacy to the extent that first, all actions taken within that system have ethical consequences, insofar as they irrevocably work to establish contingent truths, and second, that all human agents are inextricably bound up in the central narratives of a time and place.

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n213. Cass R. Sunstein, Democracy Isn't What You Think: Between Facts and Norms, N.Y. Times, Aug. 18, 1996, at 29; cf. MacIntyre, supra note 52, at 392 (concluding that each narrative claim concerning the boundaries of justice (e.g. Humean tradition or Augustinian tradition) is advanced "within an institutionalized framework largely informed by the assumptions of liberalism, so that the influence of liberalism extends beyond the effects of its explicit advocacy.").

n214. See MacIntyre, supra note 52, at 389.

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Because it may be impossible or undesirable to escape the narrative of liberalism completely, we examine its ability to actually achieve an authentic justice. There is no simple meaning of liberalism, but many evolving strains. It may be useful to consider Ronald Dworkin's distinction between neutrality-based liberalism and equality-based liberalism. n215 The former opposes any limitations on personal liberty because of moral skepticism toward the claim that any particular mode of being is better than any other mode. The latter version holds as fundamental the proposition that governments treat all citizens as equals, and insists on moral neutrality only to the extent that this notion of equality permits. Neutrality-based liberalism contains internal flaws which recommend against its maintenance. The first, and most obvious flaw, is the conviction that a hands-off approach with regard to personal [*143] liberties is somehow "neutral." In fact, this approach permits a form of privileging that denies alternative definitions of liberty, allowing liberty to be confused with license.

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n215. See Ronald Dworkin, A Matter of Principle 205 (1985).

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Second, neutrality-based liberalism provides no moral basis for claims against injustice. Embedded in the idea of a government which abstains from regulating liberties is the concomitant conviction that the status quo adequately represents the subdivisions of social contract. In this way, moral skepticism can produce an uncritical acceptance of dominant narratives, with the implicit suggestion that alternative conceptions lack merit. This leads Dworkin to state that neutrality-based liberalism "is a negative theory for uncommitted people." n216

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n216. Id.; cf. Putnam, supra note 208, at 1688 (identifying as the fundamental principle of Dewey's democratic theory that "the use of "social intelligence' ... is incompatible, on the one hand, with denying the underprivileged the opportunity to develop and use their capacities, and, on the other hand, with the rationalization of entrenched privilege.").

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Even within the framework of equality-based liberalism there are alternative conceptions of what justice requires. n217 Most immediately familiar is the distinction between substantive and formal equality. n218 Aristotle based his theory of justice upon this distinction, stating that "justice is thought to be equality; and so it is, but for equals, not for everybody. Inequality is also thought to be just; and so it is, but for unequals, not for everybody. They omit the "for whom' and judge badly." n219 In order to see that differences justify different treatment, we need to recognize that people judge poorly "because each side is really saying something true about justice and hence thinks it is saying the whole truth." n220

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n217. See Rosenfeld, supra note 60, at 13 (noting that justice has been equated with equality since antiquity), 340 n.2 (acknowledging disagreement between philosophers as to whether these concepts can be equated).

n218. See Maureen B. Cavanaugh, Towards a New Equal Protection: Two Kinds of Equality, 12 Law & Ineq. J. 381, 384 (1994) (likening the plurality of meanings in "equality" to the Greeks' distinction between geometric and arithmetic equality). Arithmetic equality occurs when a first number exceeds a second by the same amount that the second exceeds a third, yielding a constant numerical distance. See id. at 421 (quoting F.D. Harvey, Two Kinds of Equality, in Classica et Mediaevalia 101, 103-04 (1965)). Geometric equality occurs when the ratio between the first and second numbers is the same as that between the second and third, so that, for instance, one item is always twice the other. See id.

n219. Id.

n220. Id.

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Aristotle suggests that society will behave justly, sometimes because a person is just, at others because a person, though not just, respects the laws or fears obloquy. n221 But in either case, the person has learned to act in accordance with the precepts of justice [*144] though experience. Education ensures that the polis operates to achieve all the good for all of its citizens. n222 Rawls asserts that to assess whether a society is just, it is inadequate to look only at whether the individuals are just. One must look at the structure and practices of the society. n223 In examining the issue of hate speech in a democratic society, one must look at the underlying institutional structure and arrangement; and in particular, at the inclusiveness or exclusiveness of the institutional arrangements.

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n221. See MacIntyre, supra note 52, at 113.

n222. See Dewey, supra note 181, at 90.

n223. See Rawls, supra note 3, at 7-11.

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The consequence of what it might entail to achieve the good for all citizens in a modern society is a subject of considerable debate. What is clear, however, is that an assessment of the good requires that all citizens be accorded equal opportunity to participate in the discourse of world-making. A concern for membership remains one of the defining characteristics of the liberal tradition. There nonetheless exists a gulf between labeling someone as a nominal member of society and giving that member an ownership role in shaping the community's priorities. Without a sense of ownership, there can be no reasonable expectation that the Jones family will be willing to accept the burden of tolerating a cross burning on their yard. n224 Only if the Jones family can identify themselves as owners within a community and rightfully perceive themselves as having power to shape their community's values should they be expected to self-identify as members, thus according tacit approval to the judgment that justice requires their tolerance of an act intended to convey the message that they are emphatically not a part of the community. Of course the very purpose and effect of hate speech is to deny and disparage the marginal membership of the less-favored subject.

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n224. See R.A.V. v. City of St. Paul, 505 U.S. 377, 379-80 (1992) (presenting a skeletal outline of the facts of the case); Lawrence, supra note 17, at 787 (examining the facts of the case in detail).

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What is at stake when St. Paul prohibits hate speech and racist acts under penalty of criminal sanctions? n225 Opinions such as that of Justice Scalia would have us believe that what is at stake is free speech itself. n226 Those who strike down prohibitions [*145] on hate speech insist that the Jones family assimilate, accepting the values of the larger society, even as society rejects their capacity for ownership. n227 Free speech is not at stake; what is at stake is a particular application of a particular notion of equality. This is the notion of equal individual rights before the state, understood as a limitation on the state's power to restrict expression.

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n225. St. Paul prosecuted R.A.V. under the city's Bias-Motivated Crime Ordinance, the constitutionality of which was the subject of the decision. See R.A.V., 505 U.S. at 380. After presenting the facts, Justice Scalia backhandedly chastised the City of St. Paul for prosecuting the case under this ordinance. See id.

n226. Contrary to Justice Scalia's suggestion, there are numerous competing notions of equality and different ways in which members of a free society may weigh these notions. Judge Alex Kozinski, in a recent speech at the University of Minnesota, argued that each member of a community has a responsibility to mitigate the harm done by racist or otherwise egregiously insensitive and psychologically harmful speech, by assuring the victim that they do not share the feelings of hatred or ill-will that informed the harmful act. Drawing on a Jewish tradition in which each member of the community, without stopping to inquire into blame or individual responsibility, joins together with other members in offering prayers of atonement to God when the Torah accidentally touches the floor, Judge Kozinski asserted that individual community members should take responsibility for ensuring that victims of racist speech feel membership in the community. The harm, as his speech recognized, is that racist speech indicates that a certain, unknowable proportion of the population wishes to exclude minority citizens from participating fully in society. It is this anti-democratic sentiment that must be weighed against the liberty interests represented by the First Amendment.

n227. See Kenneth L. Karst, Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation, 43 UCLA L. Rev. 263, 296 (1995) (noting that the law "can unsettle expectations and destabilize the status ordering of groups"); Clifford Geertz, Local Knowledge: Further Essays in Interpretive Anthropology 218-19 (1983).

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Rather than characterize the debate over regulation of racist speech as one of liberty versus equality, we should characterize it as one concerning "domains of equality." n228 "Domains of equality refers to the classes of things that are to be allocated equally." n229 This definition begs the question of why certain classes of things, and not others, are to be allocated equally. I have suggested that the breadth of a particular domain of equality may be ascertained by reference to the endured experience of participants in a democratic society. The expansiveness or narrowness in a particular domain of equality exists at a level of abstraction of a degree less than that underpinning all of liberal theory. Instead, the notion of breadth queries whether justice requires that we move beyond the narrowest possible construction of equality. In any event, these

questions exist prior to any confrontation with liberty claims. That is, a narrow conception of equality will obviously be less compatible with regulation of speech than will a more expansive definition. n230 Of course, this raises the question of why a more expan- [*146] sive notion of equality is appropriate. In this Article, I have posited that justice and participation are the values that should inform this question. Such an inquiry is a programatic and experiential question as well as a normative one. n231

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n228. See Douglas Rae et al., Equalities 45-49 (1981); Rosenfeld, supra note 60, at 16-17.

n229. Rosenfeld, supra note 60, at 16 (quoting Rae, supra note 228, at 45).

n230. See id. at 17. Rosenfeld also notes the importance of the distinction between a "domain of allocation" and a "domain of account" in Professor Rae's structural grammar of equality. The former comprises the class of things controlled for the purpose of allocation, and the latter the class of things for which a given actor seeks equality. In a claim for equality, the agent for the domain of allocation must assess the extent to which available resources overlap with the request. This distinction has repercussions for regulation of speech insofar as the state may fairly be said to be the only agent capable of structuring a dispensation of participatory interests.

n231. Substantive equality has the potential to serve a transformative role for lessening racial domination in today's world much in the same way that formal (narrow) equality played a transformative role during the Jim Crow period. Professor Crenshaw, for instance, has identified in the rhetoric of formal equality transformative and legitimating, sustaining and undermining aspects. See Kimberle Williams Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Anti Discrimination Law, 101 Harv. L. Rev. 1331, 1347-48 (1988). Although today formal equality seems limited in its ability to improve the lives of those victimized by racism, the notion of the equality of our worth as human beings remains a pinnacle of philosophical achievement, a lofty position that perpetually engenders hope for realization; and therein lies its transformative potential. See powell, Racial Realism, supra note 63, at 549-51. While this potential provides a pragmatic justification for a heightened emphasis on substantive equality, there will be questions of whether such an emphasis will positively impact the lives of the victims of hate speech, and if so, whether the benefit is worth the chink in the armor of the First Amendment.

Professor Elena Kagan worries that a shift in First Amendment doctrine allowing for some regulation of racist speech and pornography may prove detrimental to the cause of anti-subordination. See Elena Kagan, Regulation of Hate Speech and Pornography After R.A.V., 60 U. Chi. L. Rev. 873, 882 (1993). While recognizing that judicial identification of viewpoint-based regulation "may well depend on the decisionmaker's viewpoint," and that these decisionmakers are "least likely to recognize (or count as relevant) viewpoint regulation when the regulator's viewpoint lines up with [their] own," id. at 880-81, Keegstra nonetheless believes that allowing legislators to take this reality into account amounts to an impermissible "imposition of an official orthodoxy." Id. at 882 (quoting The Hon. John Paul Stevens, The Freedom of Speech, 102 Yale L.J. 1293, 1304 (1993)). Professor Kagan, although willing to

partially acknowledge the problems associated with viewing the world exclusively through one's own narrative structure and unconsciously adopting positions in accordance with that structure, seems unconvinced that the law has any transformative capacity. Instead, she suggests that women and minorities should argue for retaining the current conception of viewpoint neutrality because it ensures that legislative decisionmakers cannot impose an orthodoxy which excludes them. Professor Kagan thus acknowledges both the harm that stems from pornography and racist speech, as well as the tendency of purportedly neutral rules to perpetuate a contingent status quo, but stops short of recognizing that the connection between these two phenomena recommend searching out transformative capacities in the law. While some commentators question whether the law is a proper or efficacious vehicle for transformation, see Posner, supra note 25, at 213-15, there can be little question that law can and does presage the acceptance by society of some fundamental change. See Cass R. Sunstein, On the Expressive Function of Law, 144 U. Pa. L. Rev. 2021, 2022-25 (1996) (noting that particular positive laws make statements in support of or against a particular proposition, thereby (sometimes subtly) altering social norms, and behavior).

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A.

A Case Study in Mediation

Against the charge that inclusiveness at the expense of what many members of society consider our most basic freedom signals the decline of liberal democratic society, one might present the example of Regina v. Keegstra. n232 This Canadian Supreme Court case, which serves as an example of an alternative way of using democratic principles to valorize liberty and equality, involved the prosecution of an Alberta high school teacher, charged with communicating anti-Semitic statements to his students and requiring them to reproduce these views on exams. Mr. Keegstra was prosecuted under 319(2) of the Canadian Criminal Code, which generally prohibits "communicating statements, other than in private conversation, [which] willfully promote hatred against any identifiable group." n233 Claiming that the law violated his right to free expression under section 2(b) of the Canadian Charter of Rights and Freedoms, roughly equivalent to the First Amendment of our Constitution, n234 Mr. Keegstra appealed his conviction. In upholding his conviction, the Canadian Supreme Court determined that this expression was not protected, as it was not expression that ""serves individual and societal values in a free and democratic society.'" n235 The Court determined that although the hate speech law limited Mr. Keegstra's right to free expression, it was a justifiable delimitation in a free and democratic society. What was at stake turned out not to be the core of free expression in a democratic society. What was at stake, for the Canadian Supreme Court, was an ideal: meaningful democracy.

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n232. [1991] 2 W.W.R. 1. Professor Fish also cites Regina v. Keegstra as an example of a permissible restriction of free expression, noting that the Canadian court's reasoning starts from the premise that the right of

expression must always be balanced against the principles of membership in a society. See Fish, Speech, supra note 5, at 104-05.

n233. Regina, 2 W.W.R. at 18.

n234. Can. Const. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), 2(b) (stating that everyone has "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication").

n235. 2 W.W.R. 27 (quoting Can. Const., supra note 234, at 1).

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This decision offers a profound contrast to American case law on the same subject. The analysis follows a path within the bounds of a commitment to both liberty and equality, and mediates between these values by recourse to a collective concern for the underlying values and principles of the society, including social justice. n236 In determining what limitations on universal rights are [*148] permitted or required by a free and democratic society, the court notes that "the proper judicial perspective under [Section One] must be derived from an awareness of the synergetic relation between two elements: the values underlying the Charter and the circumstances of the particular case." n237

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n236. See id. at 34 (quoting R. v. Oakes [1986] 1 S.C.R. 103, 136).

n237. Id. at 35.

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More significantly, the Canadian Supreme Court asserted that Mr. Keegstra's expression bears only a tenuous relationship to the values embedded in section 2(b), commenting that:

one's conception of the freedom of expression provides a crucial backdrop to any [section 2(b)] inquiry; the values promoted by the freedom help not only to define the ambit of [section 2(b)], but also come to the forefront when discussing how competing interests might co-exist with the freedom under [Section One] of the Charter. n238

Commenting that it is destructive of free expression values themselves, as well as other democratic values, "to treat all expression as equally crucial to those principles at the core" of free expression, n239 the Court suggested that democratic principles recommend viewing free expression as a function of three underlying goals. These goals are truth attainment, ensuring self-fulfillment and the development of self-identity, and most importantly, from the Court's perspective, the guarantee that the opportunity for participation in the democratic process is open to all. n240 The Court simultaneously supports these rationales with the observations that hate speech can impede the search for truth, impinge on the autonomy necessary to individual development and subvert

the democratic process. Cognizant that the regulation "muzzles the participation of a few individuals in the democratic process," n241 the Court remains certain that the loss of that voice is not substantial. n242 Any decision that inhibits participation should bear a very [*149] heavy burden of justification. What is most instructive about the decision is that the Court was willing to employ a democratic calculus.

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n238. Id. at 26.

n239. Id. at 53.

n240. See id. at 55.

n241. Id. at 56.

n242. Superficially, in light of the dominant stature of the "more speech" solution in American jurisprudence, this solution appears hypocritical. However, a more nuanced and rational exploration of the distinction between the interests of Mr. Keegstra and those harmed (the students and Jews with whom they come into contact) reveal that a notion of justice infused with participation supports this choice. See Rosenfeld, supra note 60, at 249-51 (suggesting the concept of reciprocity, or justice as reversibility, as a means of testing competing claims). When competing claims stem from incompatible ideological systems, justice as reversibility offers no reason for one claimant to subordinate his or her interests to the other. See id. By this logic, a racist may admit that his views are harmful, but claim that his position is religiously mandated. Such a radical variance of perspective, while rendering claims incommensurable, does not, however, mean anything for the adjudication of competing claims within a coherent and just system of governance. Because Mr. Keegstra implicitly accepts the requisites of democratic society, his refusal to abide by the dictates of that system provides no defense.

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The outcome of the decision, however, is less important than the reasoning. n243 This case cogently demonstrates that an interpretive methodology that recognizes the shared attributes of justice and equality will be less likely to privilege liberty interests. We have seen that the concept of justice is not monolithic, but rather depends for its substance on the perspectives of its explicators. This decision has less to do with a conflict between liberty and equality than it does with the adoption of a "domain of equality" capable of grasping the importance of participation to the exercise of democratic prerogatives. n244

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n243. Cf. Farber, supra note 177, at 189 (suggesting that a "Brandeis-ian"' solution to the problem of hate speech would involve imaginative efforts at framing the fundamental issues involved and would expand the parameters of debate and dialogue to identify ultimate goals; this approach similarly counsels not for or against one constituency, but rather attempts to delve beneath the antagonisms of superficial debate).

n244. .See Rosenfeld, supra note 60, at 16-21 (discussing the view that identification of a domain of equality is prior to engaging questions of liberty).

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The Canadian Supreme Court felt that the objectives of the hate-speech regulation were clear, and included minimizing the impact of emotional, psychological, and participatory consequences arising from hate speech as well as protecting against the potential for hate speech to gain credence, thereby contributing to discrimination. n245 There must be a fine line guarding the government's capacity to impose an orthodoxy concerning what obtains toward truth, but on this view, the damage to individual possibility and democratic probability crosses that line. This decision turns on the unwillingness of the Canadian Supreme Court to accept abstract justifications for free expression. Instead, they exhibit tolerance only for free expression which comports with co-equal values.

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n245. See Regina v. Keegstra [1991] 2 W.W.R. 1, 43.

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Section One of the Canadian Constitution requires that the specific rights granted to each member of that society not impinge on the society's identity as a democracy. n246 Although our Constitution contains no such provision, Professor Adler has suggested that [*150] the Declaration of Independence fulfills this role. n247 The Declaration sets forth the political principles which underlie the Constitution. That the Constitution failed to represent those principles, and required the Civil War and amendment to do so should not divert our attention from that pledge. Despite the self evidence of the truths contained in our version of Section One, we continue to permit obfuscation to yield doctrinaire and decontextualized solutions to difficult legal and ethical dilemmas. When values are at odds, we would do well to follow the Canadian example and admit the clash. Only then will it be possible to say what justice requires.

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n246. Can. Const. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), 1 ("The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits proscribed by law as can be demonstrably justified in a free and democratic society.").

n247. See Adler, supra note 4, at 37-38.

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Conclusion

Projecting the decision in Keegstra onto an American screen, we might say that the First Amendment is slow in heading toward the confluence of liberty and equality, slow in accepting the intersectionalities of the American voice.

n248 This is perhaps in part because we succumb to the loudest of American voices which proclaim the evil of tyranny in the modern guise of state censorship to an ever credulous society. The threat of silencing great poetic voices and placing facades of intolerance in front of great art elicit immediate and vociferous responses. But when the response inevitably fails to consider that the silence and invisibility which lie in the wake of oppression are also the stuff of limits, we fail to achieve the ideal of "a free and democratic society." n249

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n248. See Jean Stefancic & Richard Delgado, A Shifting Balance: Freedom of Expression and Hate-Speech Restriction, 78 Iowa L. Rev. 737 (1993) (identifying in recent commentary on the First Amendment a nascent shift in thinking, away from doctrinaire constructions, and toward a more nuanced and complex set of formulations that comport more closely with the realities of.our lived experience).

n249. Can. Const. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), 1.

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What is at stake when we regulate forms of hate speech? Not "free expression," however that may be defined at the moment (consider the powerful implications of social inertia embedded in O'Brien, Texas v. Johnson, and Abrams). Keegstra v. Regina admonishes us to accept that the First Amendment, like any guiding principle, will always be infused with a set of values, that no holy writ exists to which we can appeal for a definitive or doctrinaire solution. The First Amendment is only a set of words, "inherently nothing," n250 to which we bring our provisional judgments. Though [*151] dialogue will eventuate alteration and transformation, n251 any shift in contexts must be constrained by the dictates of justice in a democratic society. This delimitation is no mere imposition of a personal preference, but rather an observation culled from employing experience as a metaphor for transformation. n252 You can't just decide you are going to change the behavior of a nation. But you can decide that in making difficult judgments about what justice should require or permit, a nation may be asked to adhere to its basic values, and if these are in tension, seek recourse in a judgment infused with the ideals of pragmatic democracy.

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n250. Fish, Speech, supra note 5, at 113.

n251. See supra notes 80-88 and accompanying text (discussing the intersection of transformation and experience).

n252. See Delgado & Stefancic, supra note 14, at 70-94 (discussing how the slow transformation in White American "images of the outsider" yields a "how could they" reaction in response to yesterday's racist depiction).

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LEVEL 1 - 55 OF 96 ITEMS

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ARTICLE: RIGHTS AGAINST RULES: THE MORAL STRUCTURE OF AMERICAN CONSTITUTIONAL LAW

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SUMMARY:
... The First Amendment refers to the "right" of free speech, for example, the Fifth Amendment to the process that is "due" to citizens, and the Fourteenth to protection that is "equal." ... Constitutional rights to free speech, equal protection, free exercise, and substantive due process function, in practice, as protection for rights-holders quite independent of the Double Jeopardy Clause - that is, as protection against being sanctioned pursuant to the wrong rule R even if R is the sole rule that the state deploys against the rights-holder. ... For example, an expressive theory stipulates that a sanction, to be morally justified, must express what it was about the actor's conduct that made it wrong. ... In saying that these two schemas, the Liberty Schema and Discrimination Schema, suffice to explain the Court's free speech, etc., case law, I mean simply this: virtually all the cases in which the Court has recognized claims of constitutional right under the free speech, etc., clauses can be explained as cases in which the underlying rules fit the pattern of moral invalidity set forth by either the Liberty Schema, the Discrimination Schema, or perhaps both. ...

TEXT:
[*2]

Introduction

What is the moral content of constitutional rights? In one sense, the "moral reading" of the Bill of Rights proposed, most famously, by Ronald Dworkin, is surely correct:

The clauses of the American Constitution that protect individuals and minorities from government are found mainly in the so-called Bill of Rights - the first

several amendments to the document - and the further amendments added after the Civil War.... Many of these clauses are drafted in exceedingly abstract moral language. The First Amendment refers to the "right" of free speech, for example, the Fifth Amendment to the process that is "due" to citizens, and the Fourteenth to protection that is "equal." According to the moral reading, these clauses must be understood in the way their language most naturally suggests: they refer to abstract moral principles and incorporate these by reference, as limits on government's power. n1

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n1. Ronald Dworkin, Freedom's Law: The Moral Reading of the American Constitution 7 (1996) [hereinafter Dworkin, Freedom's Law]; see also Ronald Dworkin, Taking Rights Seriously 132-37 (1977) (advancing moral reading of the Bill of Rights) [hereinafter Dworkin, Taking Rights Seriously].

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The Bill of Rights, by means of open-ended terms such as "freedom of speech," "equal protection," or "due process," n2 refers to moral criteria, which take on constitutional status by virtue of being thus referenced. We can disagree about whether the proper methodology for judicial application of these criteria is originalist or non originalist. The originalist looks, not to the true content of the moral criteria named by the Constitution, but to the framers' beliefs about that content; n3 the nonoriginalist tries to determine what the criteria truly require, and ignores or gives less weight to the framers' views. n4 Bracketing this disagreement, however, it is surely correct to say - as Dworkin and many other prominent constitutional scholars have said n5 - that the Constitution, through the open- ended clauses of the Bill of Rights, incorporates parts of morality.

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n2. U.S. Const. amends. I, XIV, V.

n3. See, e.g., Robert Bork, The Tempting of America 143-85 (1990) (defending originalism).

n4. See Matthew D. Adler, Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty, 145 U. Pa. L. Rev. 759, 781 n.69 (1997) (citing leading nonoriginalists); Daniel A. Farber, The Originalism Debate: A Guide for the Perplexed, 49 Ohio St. L.J. 1085 (1989) (describing disagreements between originalists and nonoriginalists).

n5. See Adler, supra note 4, at 781 n.69 (citing sources).

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Yet there is also a sense in which this "moral reading" of the Constitution is mistaken, or at least needs to be qualified. Constitutional rights have a special formal structure - a formal structure so familiar to us that this structure, and therewith its significance, have [*3] become invisible. I will call this structure the "Basic Structure." Constitutional rights are

rights against rules. A constitutional right protects the rights-holder from a particular rule (a rule with the wrong predicate n6 or history); it does not protect a particular action of hers from all the rules under which the action falls. n7 As a consequence of the Basic Structure, a constitutional right has only derivative moral content - or so this article will try to show. To say that X's treatment pursuant to a rule R violates X's "constitutional rights," or that the treatment is "unconstitutional," does not entail that the treatment itself is morally wrong, or morally problematic, or that there is moral reason to overturn the treatment ceteris paribus, or that the treatment violates X's moral rights, or that moral wrong has been done to X, or anything like this. All the statement entails is that there exists moral reason to repeal or amend the rule R.

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n6. By the "predicate" of a rule, I mean the act-description contained in the rule's canonical formulation. See infra text accompanying note 58 (discussing the concept of "rules" and their "predicates").

n7. See Lawrence A. Alexander, Is There An Overbreadth Doctrine?, 22 San Diego L. Rev. 541, 545 (1985) ("The Constitution's individual rights provisions by and large do not protect specific conduct per se. ... Rather, the Constitution ordinarily limits the types of reasons that government may act upon in regulating conduct.").

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Let us begin by considering a famous and, for my purpose, exemplary case: the flag-desecration case, Texas v. Johnson. n8 Mr. Johnson, who had burned an American flag during a political demonstration, was prosecuted for and then convicted of violating a Texas statute that read: " 'A person commits an offense if he intentionally or knowingly desecrates ... a state or national flag.' " n9 He was sentenced to one year in prison and fined $ 2,000. Johnson challenged his sanction on constitutional grounds, claiming that it violated his right to free speech under the First Amendment. When the case reached the U.S. Supreme Court, the Court agreed with Johnson's claim, and overturned his sanction. n10 Crucially, the Court did not hold that Johnson was constitutionally immune from sanction, under any statute, for the actions that had prompted the State's prosecution. "We ... emphasize that Johnson was prosecuted only for flag-desecration - not for trespass, disorderly conduct, or arson." n11 Rather, what violated Mr. Johnson's rights was [*4] being sanctioned pursuant to a rule with the wrong rule-predicate - one that targeted the wrong type of action. As the Court explained: "'A law directed at the communicative nature of conduct [such as a law prohibiting "flag desecration"] must ... be justified by the substantial showing of need that the First Amendment requires,'" n12 and the State of Texas was unable to make that substantial showing.

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n8. 491 U.S. 397 (1989).

n9. Johnson, 491 U.S. at 400 n.1 (quoting Tex. Penal Code Ann. 42.09 (West 1989)).

n10. See 491 U.S. at 418.

n11. 491 U.S. at 413 n.8. Although the Court did state that Johnson had not stolen the flag he burned, 491 U.S. at 412 n.8, this statement should not, in my view, be read to imply that Johnson's conviction was unconstitutional only by virtue of his action's being innocent under every description. See 491 U.S. at 412 n.8 (stating that "our inquiry is, of course, bounded by the particular facts of this case and by the statute under which Johnson was convicted" (emphasis added)); United States v. Eichman, 496 U.S. 310, 313 n.1, 319 (1990) (overturning charge against flag burners pursuant to federal flag-mutilation statute, without disturbing charge against certain claimants for causing willful injury to federal property); R.A.V. v. City of St. Paul, 505 U.S. 377, 379-80, 396 (1992) (overturning charge against teenager pursuant to Minnesota ordinance prohibiting hate speech, where teenager's particular action was burning a cross inside the fenced yard of a black family). See generally infra Part I (describing how constitutional rights generally function as shields against rules, not shields for actions). Why, then, did the Court even note that Johnson was innocent of theft? Perhaps because the Court thought this fact relevant to his as-applied challenge. See Johnson, 491 U.S. at 403 n.3 (sustaining Johnson's as-applied challenge to flag-desecration statute without reaching his facial challenge); infra text accompanying notes 140-45 (discussing how as-applied adjudication is consistent with the proposition that constitutional rights do not shield actions).

n12. Johnson, 491 U.S. at 406 (emphasis deleted) (quoting Community for Creative Non- Violence v. Watt, 703 F.2d 586, 622 (1983) (Scalia, J., dissenting), rev'd sub nom. Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984).

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Texas v. Johnson exemplifies what I have called the Basic Structure: that constitutional rights are rights against rules. Mr. Johnson's very action of flag-desecration might also have been an action of destroying government property (if the flag he desecrated had belonged to the government), n13 or pollution (if the flag was burned, and dangerous chemicals were thereby released into the atmosphere), or battery (if the flag was burned in close proximity to a bystander, who was badly injured), or perhaps, as the Court suggested, arson, disorderly conduct, or trespass. n14 Had Mr. Johnson been sanctioned under a rule that employed one of these constitutionally unobjectionable predicates, no constitutional right of Johnson's would have been violated. n15 Indeed, nothing in the [*5] Court's decision precluded Texas from sanctioning Mr. Johnson pursuant to an unobjectionable rule, in a future prosecution, for the very action of his that had given rise to the flag-desecration prosecution. n16 Where the State of Texas had gone wrong was in prosecuting Johnson under the wrong rule - under a rule that prohibited "flag desecration." And what violated Mr. Johnson's First Amendment rights, in Texas v. Johnson, was being sanctioned for his action under that rule - not being sanctioned for that action simpliciter.

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n13. See United States v. Haggerty, 731 F. Supp. 415, 416, 422 (W.D. Wash. 1990) (overturning charge pursuant to federal flag-mutilation statute, for action of burning flag belonging to U.S. Postal Service, without disturbing charge pursuant to statute prohibiting wilful injury to federal property),

affd. sub nom. United States v. Eichman, 496 U.S. 310 (1990).

n14. On the nature of actions as particular things that can be picked out under multiple descriptions, see infra text accompanying notes 63-67. It appears that, in fact, Mr. Johnson's particular action of flag-burning did not fall under the further description of "battery." See Johnson, 491 U.S. at 399.

n15. It remains open to discussion whether and, if so, when the application of a no-trespass rule to speech will violate the First Amendment. Compare Marsh v. Alabama, 326 U.S. 501 (1946) (holding that the application of a no-trespass law to a speaker, who was on the premises of a company town, violated the First Amendment) with Hudgens v. NLRB, 424 U.S. 507 (1976) (declining to recognize free speech right to picket on premises of shopping center, and distinguishing Marsh). See generally infra text accompanying notes 354-64 (discussing viability of First Amendment challenges to rules that pick out nonexpressive properties of actions).

n16. See Montana v. Hall, 481 U.S. 400, 402 (1987) ("It is a 'venerable principle of double jeopardy jurisprudence' that 'the successful appeal of a judgment of conviction, on any ground other than the insufficiency of the evidence to support the verdict, poses no bar to further prosecution on the same charge' [i.e., a charge that would otherwise be the same for double jeopardy purposes]." (alteration in original) (citation omitted) (quoting United States v. Scott, 437 U.S. 82, 90-91 (1978))).

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Consider, now, two possible accounts of the moral content of Mr. Johnson's First Amendment rights. First, consider what I will call the Direct Account.

The Direct Account

To say that some treatment of X (sanctioning X pursuant to a rule, or subjecting X to the duty that the rule announces) "violates X's constitutional rights" entails the following: the treatment is directly wrong, and X has the legal right to secure judicial invalidation of the treatment. "Directly wrong" means that there is sufficient moral reason n17 for the court to invalidate the treatment (overturn X's sanction, or free X from the duty), quite independent of any further invalidation of the rule under which the treatment falls.

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n17. Throughout this article, I use the term "moral reason" in a generic way, which is meant to be neutral between consequentialist and deontological moral views. To say that "moral reason" obtains to overturn a claimant's treatment, or a rule, means that: (1) overturning the treatment or rule does not violate any deontological constraints, and is required under applicable consequentialist criteria; or (2) overturning the treatment or rule is required by deontological constraints. On the difference between deontological and consequentialist moral views, see generally Samuel Scheffler, The Rejection of Consequentialism 1-40 (1994).

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On the direct account of Texas v. Johnson, it is morally improper to sanction Mr. Johnson for "flag desecration," even if his action happened to have been an action of property-destruction, pollution, or battery. To sanction him for "flag desecration" is to sanction him on the wrong grounds - on the basis of his speech, rather than the harmful, nonexpressive properties of his action - and there is moral reason for the State of Texas not to do that. To be sure, if Mr. Johnson was a polluter, batterer, or property-destroyer, he ought to [*6] be sanctioned. But he ought to be sanctioned pursuant to the right kind of rule, and it is not a matter of moral indifference which rule the State of Texas deploys against him.

By contrast, what I will call the Derivative Account of constitutional rights says something quite different.

The Derivative Account

To say that some treatment of X (being sanctioned pursuant to a rule, or subjecting X to the duty that the rule announces) "violates X's constitutional rights" entails the following: there is sufficient moral reason to change in some measure the scope of the rule, and X has the legal power to secure the invalidation - the repeal or amendment - of the rule, including his own treatment. There may or may not be moral reason to overturn X's treatment, ceteris paribus.

On the derivative account of Texas v. Johnson, it would be (or might be) n18 a matter of moral indifference which rule the State of Texas deployed against Johnson, if Johnson's action of flag- desecration also happened to have been an action of property-destruction, pollution, or battery. If his action happened to have been wrongful under a different description, there would be (or might be) nothing at all morally problematic in sanctioning Mr. Johnson pursuant to the flag-desecration statute. Rather, what is morally problematic, on the Derivative Account, is for Texas to have in place a statute that prohibits flag-desecration. This is morally problematic because some actions covered by that statute are innocent actions. Some actions of flag-desecration do not have further, wrong-making properties such that they are properly sanctioned or coerced - they are not also actions of property-destruction, pollution, battery, etc. - and therefore Texas is morally required to repeal or amend the flag-desecration statute. n19

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n18. I say "might be" here to signal the following: The Derivative Account does not entail that it is a matter of moral indifference which statute Texas uses to sanction Johnson. Rather, on the Derivative Account, the propriety of a claimant's particular treatment is simply not the proper moral focus of reviewing courts. Instead, their proper moral focus is on whether the underlying rule should be repealed or amended. See infra section III.A.3 (explaining how, within the Derivative Account, the judicial decision to uphold or invalidate a claimant's treatment depends upon the extent to which the court revises the underlying rule). So the proponent of the Derivative Account in Johnson will say that, although the choice of rule with respect to Johnson may make a moral difference, that is not entailed by his having a constitutional right.

n19. See infra text accompanying notes 315-42 (detailing how rule against "flag desecration" violates liberties, by including otherwise innocent

speech-acts within its scope).

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Mr. Johnson's own action of flag-desecration may have been innocent of further wrong-making properties; it may not have been. [*7] But that is irrelevant to Johnson's constitutional claim. On the Derivative Account, his case is simply an occasion n20 for the reviewing court to invalidate - to repeal or amend - Texas's statute. Because the statute does moral wrong to someone (whether Mr. Johnson, or other persons), the reviewing court rightly invalidates the statute, including but not limited to the sanction Mr. Johnson has received. n21

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n20. For a similar view of the particular cases that federal courts adjudicate as mere occasions for broader, constitutional change, see Owen M. Fiss, Foreword: The Forms of Justice, 93 Harv. L. Rev. 1, 11 (1978).

n21. Indeed, there is nothing in the Derivative Account itself that requires the judicial invalidation of the statute to include an invalidation of the claimant's own treatment, although the standing component of Article III may impose such a requirement. See infra text accompanying notes 401-08, 574-78 (arguing that requirement of personal benefit to the claimant is extrinsic to the Derivative Account).

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Which of these two accounts, direct or derivative, is the correct account of the moral content of constitutional rights? To put the distinction between the two most succinctly: on the Direct Account, constitutional adjudication essentially involves the invalidation of the rights-holder's own treatment (her sanction, or her duty), while on the Derivative Account, it essentially involves the judicial repeal or amendment of rules. Which of these two accounts best describes the connection between constitutional law and morality?

In this article, I will argue that the Derivative Account is the correct one. The Derivative Account provides an elegant, unified, and morally straightforward view of constitutional rights and constitutional adjudication. It holds true, I will claim, not just for the free speech rights at stake in Texas v. Johnson, but for the entire array of substantive constitutional rights that figure in modern constitutional law: rights to speech, n22 to religious freedom, n23 to equal protection, n24 and to substantive due process. n25 The Direct Account, by contrast, turns out to involve a view about morality - about the moral significance of the description under which someone is sanctioned, coerced, or otherwise set back by a legal rule - that is morally untenable, at least for purposes of constitutional law. And [*8] although the Direct Account may be attractive to constitutional lawyers and scholars on institutional grounds - because it is consistent with a certain, purist view about the limited powers of federal courts - that view should be rejected. The purist view is that federal courts lack the legal power to repeal or amend rules; the legal force of the court's judgment extends only to the parties, and therefore the judicial focus in constitutional cases can only be, as the Direct Account claims, the moral propriety of the claimant's own treatment. n26 But the purist view is wrong; federal courts do have the power to repeal or amend rules, and they can,

consistent with Article III of the Constitution, n27 adopt the rule-centered rather than claimant-centered perspective required by the Derivative Account.

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n22. See U.S. Const. amend. I ("Congress shall make no law ... abridging the freedom of speech").

n23. See U.S. Const. amend. I ("Congress shall make no law ... prohibiting the free exercise [of religion]").

n24. See U.S. Const. amend. XIV ("nor shall any State ... deny to any person within its jurisdiction the equal protection of the laws").

n25. See U.S. Const. amend. XIV ("nor shall any State deprive any person of life, liberty, or property, without due process of law"); U.S. Const. amend. V ("nor shall any person ... be deprived of life, liberty, or property, without due process of law"); infra text accompanying notes 53-60 (explaining article's focus on free speech, free exercise, equal protection and substantive due process rights).

n26. See infra section III.B (describing possible institutional objections to the Derivative Account).

n27. See U.S. Const. art. III, 2 (confining federal judicial power to "Cases" and "Controversies").

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This article has three Parts. Part I sets the stage for my argument, by demonstrating that the Basic Structure obtains. This is, I should emphasize, a descriptive claim. My claim is that the following description of the current constitutional case law, as set forth by the U.S. Supreme Court and followed by the lower federal courts, is true: constitutional rights are rights against rules. Things could be different; constitutional rights could be structured as shields around actions, rather than shields against rules; but they are not. The Basic Structure is our official structure, as constitutional doctrine now stands. This is true across the Bill of Rights, not just of free speech. For example, it would violate the gender-discrimination component of the Equal Protection Clause to sanction X pursuant to a rule that prohibits "the purchase of alcohol by men under twenty-one," n28 even if X's action is sanctionable under some other rule (such as a rule against credit-card fraud). It would violate the race- discrimination component of the Equal Protection Clause to sanction a black person under a law banning interracial marriages, n29 even if the black person is also a bigamist. Or - to switch from equal protection to religious freedom - it would violate the free exercise rights of members of the Santeria religion (who engage in ritual animal sacrifice) to sanction them pursuant to a law targeted [*9] at Santeria, n30 even for their ritual sacrifice of eagles, cougars, pandas and other endangered species.

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n28. See Craig v. Boren, 429 U.S. 190 (1976) (invalidating, under Equal Protection Clause, statute prohibiting sale of low-alcohol beer to men but not women between the ages of 18 and 21).

n29. See Loving v. Virginia, 388 U.S. 1 (1967) (invalidating, under Equal Protection Clause, statute prohibiting interracial marriages).

n30. See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (invalidating, under Free Exercise Clause, statute prohibiting animal sacrifice that was targeted at the Santeria religion).

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Parts II and III are the heart of the article. In Part II, I reject the Direct Account. This Part considers, and finds wanting, a wide array of possible defenses for the Direct Account: for the claim that X's constitutional right entails the existence of moral reason to overturn X's own treatment, independent of further invalidating the rule under which that treatment falls. Some of these defenses are, on balance, unpersuasive: for example, the view that (in general) a necessary condition for a morally and constitutionally justified sanction is that the sanctioned person be sanctioned under the right kind of rule. n31 Some of these defenses, albeit persuasive or even compelling, explain at best a limited set of constitutional rights: for example, the view that sanctioning or coercing a black person under a law that contains the predicate, "black," is to stigmatize and thereby directly wrong her. n32 And some of the defenses are simply question-begging: for example, the standard appeal to the "illegitimate purpose" of the legislator, such as a purpose to suppress speech, as somehow morally tainting the treatments meted out pursuant to the law that the legislator enacts. n33

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n31. See infra section II.A.1.

n32. See infra section II.B.2.

n33. See infra note 278 (arguing that the idea of an illegitimate legislative purpose or motivation is ambiguous, and that the different ways in which this ambiguous idea might be made more precise do not, in fact, underwrite the Direct Account).

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Part III, in turn, argues in favor of the Derivative Account. On the Derivative Account, the reason X's constitutional rights can be violated by one rule, even if the very action she performed is properly sanctioned or coerced under a different rule, is quite straightforward. It is straightforward to explain how, given two different rules that intersect to cover the very same action, the moral criteria set forth in the Bill of Rights require that one of the rules, but not the other, be repealed or amended. Freedom of speech requires that a rule against "flag desecration" be repealed, because some actions of flag-desecration are innocent, and the ones that are not innocent will fall under other rules. Conversely, freedom of speech does not require that a rule against "arson" be repealed, because all actions of arson are seriously wrong. It is, or may be, n34 a matter of moral indifference whether the arsonous flag-desecrator is sanc [*10] tioned for "flag desecration" or, instead, for "arson"; but it is not a matter of moral indifference, under the First Amendment, whether we leave in place a rule against "flag desecration." Similarly, as I shall argue, it is, or may be, a matter of moral indifference

whether the thieving, nineteen-year-old, male drinker is prosecuted pursuant to a gender-discriminatory rule prohibiting the sale of alcohol to nineteen-year-old men, or pursuant to a neutral law prohibiting credit-card fraud; but it is not a matter of moral indifference, under the Equal Protection Clause, whether we leave in place the gender- discriminatory rule. And so forth for the rest of the Bill of Rights.

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n34. See supra note 18.

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Part III also raises and rebuts possible institutional objections to the Derivative Account. These include, inter alia, the purist view of the powers of federal courts. Federal courts do, indeed, have the legal power to repeal or amend rules, and Article III of the Constitution permits them to adopt the rule-centered perspective required by the Derivative Account. The remedies that federal courts enter in constitutional cases - including not merely class-action cases, but also individual cases, whether enforcement actions or anticipatory suits brought by claimants - should always be understood as repealing or amending rules. This is technically plausible, morally attractive, and consistent with the concept of "adjudication" embodied in Article III.

Finally, the conclusion to the article surveys the doctrinal implications of the arguments advanced in Parts I, II, and III. Although the methodology of the article is theoretical, not doctrinal, my ultimate purpose is a doctrinal one. Constitutional theory is ultimately important because of its practical import, for the practices of reviewing courts and other institutions. Originalists will want Roe v. Wade n35 to be decided one way; nonoriginalists will, or may, want it decided a different way. So too, as we shall see, the defenders of the Direct and Derivative Accounts will disagree on a wide variety of doctrinal matters. These include matters such as timing, remedy, and the propriety of facial invalidation. The paradigmatic constitutional suit for the Direct Account is a retrospective as-applied challenge by a claimant who has already acted and been sanctioned under a rule, n36 while the paradigmatic constitutional suit for the [*11] Derivative Account is a prospective facial challenge to a rule, by a claimant who has yet to act and seeks first the rule's immediate repeal. n37 In recent years, these matters - in particular, the propriety of facial invalidation n38 - have generated heated controversies among scholars and at the Supreme Court. n39 This article provides a theoretical foundation for addressing such matters. Although it is beyond the scope of this article to defend a specific position on the numerous doctrinal questions implicated by the morally derivative [*12] cast of constitutional rights, the conclusion will show just how wide- ranging the doctrinal implications of the Derivative Account are.

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n35. 410 U.S. 113 (1973); see Adler, supra note 4, at 780-85 (describing debate between originalists and nonoriginalists over legitimacy of Roe).

n36. See, e.g., In re R.M.J., 455 U.S. 191 (1982) (retrospective, as-applied challenge under Free Speech Clause); Wisconsin v. Yoder, 406 U.S. 205 (1972) (retrospective, as-applied challenge under Free Exercise Clause); Griswold v. Connecticut, 381 U.S. 479 (1965) (retrospective, as-applied challenge under

the substantive component of the Due Process Clause); see also Loving v. Virginia, 388 U.S. 1 (1967) (retrospective challenge under Equal Protection Clause). See generally infra text accompanying notes 290-92, 588-91 (discussing the status of sanctions, within the Direct Account, as the paradigmatically concrete setbacks to claimants).

n37. See, e.g., Reno v. ACLU, 117 S. Ct. 2329 (1997) (anticipatory, facial challenge to rule, under Free Speech Clause); Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (anticipatory, facial challenge to rule, under Free Exercise Clause); Planned Parenthood v. Casey, 505 U.S. 833 (1992) (anticipatory, facial challenge to rule, under the substantive component of the Due Process Clause); Craig v. Boren, 429 U.S. 190 (1976) (anticipatory, facial challenge to rule, under Equal Protection Clause). See generally infra text accompanying note 598 (discussing timing of constitutional suits, within Derivative Account).

n38. See generally Michael Dorf, Facial Challenges to State and Federal Statutes, 46 Stan. L. Rev. 235 (1994) (discussing distinction between facial and as-applied challenges, and surveying case law).

n39. The controversy about facial challenges was triggered by the Court's announcement, in United States v. Salerno, that: "A facial challenge to a legislative Act is ... the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." 481 U.S. 739, 745 (1987). Since this announcement, the Justices have heatedly debated the propriety of facial invalidation, particularly in the area of abortion rights. See Janklow v. Planned Parenthood, 517 U.S. 1174, 1175 (1996) (denying certiorari) (memorandum of Stevens, J.); Fargo Women's Health Org. v. Schafer, 507 U.S. 1013, 1013 (1993) (denying stay) (O'Connor, J., concurring); Ada v. Guam Socy. of Obstetricians & Gynecologists, 506 U.S. 1011, 101 (1992) (denying certiorari) (Scalia, J., dissenting); Casey, 505 U.S. at 972-73 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

The Justices have debated the propriety of facial challenges in many other areas as well, including free speech, see National Endowment for the Arts v. Finley, 118 S. Ct. 2168, 2193-96 (1998) (Souter, J., dissenting); Reno, 117 S. Ct. at 2355-56 (O'Connor, J., concurring in the judgment in part and dissenting in part); Colorado Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 631-34 (1996) (Thomas, J., concurring in the judgment and dissenting in part); United States v. Edge Broad. Co., 509 U.S. 418, 429-36 (1993); Edenfield v. Fane, 507 U.S. 761, 779-81 (1993) (O'Connor, J., dissenting); the Establishment Clause, see Bowen v. Kendrick, 487 U.S. 589, 626-30 (1988) (Blackmun, J., dissenting); equal protection, see Romer v. Evans, 517 U.S. 620, 643 (1996) (Scalia, J., dissenting); the Takings Clause, see Pennell v. City of San Jose, 485 U.S. 1, 15-19 (1988) (Scalia, J., concurring in part and dissenting in part); and other aspects of substantive due process, such as assisted suicide, see Washington v. Glucksberg, 117 S. Ct. 2302, 2304-05 (1997) (Stevens, J., concurring in the judgments of Washington v. Glucksberg, 117 S. Ct. 2258 (1997), and Vacco v. Quill, 117 S. Ct. 2293 (1997)).

Ripeness became a matter of some controversy in Reno v. Catholic Social Services, 509 U.S. 43 (1993), which dismissed as unripe a challenge by certain would-be beneficiaries to a benefit-conferring rule, on the grounds that the claimants had not yet applied for and been denied the benefit they sought.

Reno calls into question the availability of prospective challenges to benefit-conferring rules. See Reno, 509 U.S. at 67-70 (O'Connor, J., concurring in the judgment) (criticizing majority's ripeness holding); 509 U.S. at 77-83 (Stevens, J., dissenting) (same); 2 Kenneth Culp Davis & Richard J. Pierce, Jr., Administrative Law Treatise 15.14, at 381-84 (1994) (same).

Finally, the scope of judicial remedies has, in recent years, been much debated by constitutional scholars, in the form of a dispute about the legitimacy of Cooper v. Aaron, 358 U.S. 1 (1958). See infra notes 502-05 and accompanying text (describing this dispute).

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In particular, and most profoundly, the Derivative Account explicates the basic doctrinal structure of modern constitutional law. Every constitutional lawyer and scholar knows well the various rule-validity "tests" around which constitutional adjudication is structured: narrow-tailoring tests, under the First Amendment, that require rules regulating speech to be sufficiently closely tailored to sufficiently important interests; n40 antidiscrimination tests under the Equal Protection Clause, that require rules discriminating on the basis of race n41 or gender n42 to be more or less strictly scrutinized; and the parallel antidiscrimination test, for rules discriminating against religious groups or practices, that has become canonical for the Free Exercise Clause. n43 But what is the function of these familiar tests? What do they accomplish? The proponent of the Direct Account will claim this: To sanction or coerce X pursuant to a rule that fails a test is to do moral wrong to X; it is to inflict a treatment upon X such that moral reason obtains ceteris paribus to overturn X's treatment. n44

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n40. See, e.g., Boos v. Barry, 485 U.S. 312, 321 (1988) (describing strict, narrow-tailoring scrutiny for content-based rules regulating speech); Clark v. Community for Creative Non- Violence, 468 U.S. 288, 293 (1984) (describing intermediate, narrow-tailoring scrutiny for content-neutral rules regulating speech).

n41. See Loving v. Virginia, 388 U.S. 1, 11 (1967) ("Racial classifications [should] be subjected to the 'most rigid scrutiny,' and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of ... racial discrimination." (quoting Korematsu v. United States, 323 U.S. 214, 216 (1944))).

n42. See Craig v. Boren, 429 U.S. 190, 197 (1976) ("To withstand constitutional challenge ... classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives.").

n43. See Employment Div. v. Smith, 494 U.S. 872, 877, 879 (1990) (holding that state may not seek "to ban ... acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display" but that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability' " (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment))).

n44. See Henry Paul Monaghan, Overbreadth, 1981 Sup. Ct. Rev. 1, 1-4 (arguing that a separate and special overbreadth doctrine does not exist, and that instead both the Court's overbreadth decisions and its ordinary constitutional decisions are grounded upon the right of claimants to be judged in accordance with a constitutionally valid rule of law).

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But this is incorrect. On the Derivative Account - the correct account - the pervasive and familiar constitutional tests, governing the predicates and history of rules, are simply tests for whether a rule should be judicially repealed or amended. The essential function of constitutional courts is to assess rules against these kind of moral tests, and to repeal or amend those rules that are moral failures. This is what my article tries to show.

[*13]

I. The Basic Structure

A constitutional right provides a legal advantage, of some kind, for the rights-holder. n45 But what kind of advantage is that? We can imagine a legal world in which constitutional rights were structured as protective shields around certain types of actions. A particular action of some person would either have this protective shield - if the action were, say, sufficiently harmless, or sufficiently important to the actor - or not. If the action bore the protective shield, then the rights-holder would be legally immune from being sanctioned for performing the action, or coerced not to perform it, pursuant to any rule. Conversely, if a particular action of some person did not have the protective shield, then the state would be free to sanction the actor for performing the action, or to coerce the actor not to perform it, pursuant to any rule. Protected actions would be protected, not just from discriminatory or overbroad rules, but from perfectly neutral, ordinary rules as well. Conversely, unprotected actions could be legally sanctioned, or coerced, pursuant to rules that discriminated on the basis of race, gender, viewpoint, or religion. This would just be how constitutional rights worked. n46

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n45. See Carl Wellman, Real Rights 8-11 (1995) (defining a legal right as a complex of favorable Hohfeldian positions, that is, claim-rights, liberties, immunities, and powers, that function to confer a legal advantage upon the rights-holder).

n46. This is not a crazy idea, given the centrality of actions to morality. At bottom, any particular action is either morally permissible, or morally impermissible - the latter either because the action breaches a deontological side-constraint, or because it makes the world worse in some manner picked out by a consequentialist standard. See Geoffrey Scarre, Utilitarianism 129 (1996) (noting that many philosophers now believe that the criterion of overall well-being is best construed, within utilitarianism, as a criterion for evaluating particular actions, not for evaluating rules somehow generalized from actions); Scheffler, supra note 17, at 80-114 (discussing deontological, i.e., nonconsequentialist, side-constraints).

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But of course constitutional rights work nothing like this. n47 Constitutional rights in our own legal world are structured, not as shields around particular actions, but as shields against particular rules. What violates X's constitutional right, what she has a constitutional right against, is for a particular rule to be (fully) in legal [*14] force: n48 a rule with the wrong predicate or history. We saw that point in the flag-desecration case: sanctioning Mr. Johnson for destroying a government-owned flag pursuant to a rule prohibiting "flag desecration" would violate his constitutional rights, while sanctioning him for destroying a government-owned flag pursuant to a rule prohibiting the "destruction of government property" would not. As we shall see in a moment, Texas v. Johnson exemplifies the structure of substantive n49 constitutional rights across the Bill of Rights.

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n47. I am certainly not the first to note the point that a person's constitutional claim is more or less a function of the rule pursuant to which he is sanctioned or otherwise set back, and not solely a function of the action he performed. Scholars who have previously noted and discussed this feature of constitutional law include Larry Alexander, see Alexander, supra note 7, at 544-47; and Henry Monaghan, see Monaghan, supra note 44, at 4-14. However, the point is far from universally recognized. See, e.g., Gerald Gunther, Constitutional Law 1192 (1991) ("[In First Amendment challenges outside the overbreadth context] the Court asks simply whether the challenger's activities are protected by the First Amendment."); Monaghan, supra note 44, at 5 (noting that "many commentators assume that conventional constitutional challenges are invariably restricted to such fact-dependent claims of privilege").

n48. "Fully" here is meant to be neutral between the Direct and Derivative Accounts. The Direct Account says that the rule should not be fully in force, insofar as the claimant is sanctioned or coerced; the Derivative Account says that the rule should not be fully in force, insofar as it is properly amended or even wholly repealed.

n49. See infra note 60 and accompanying text (explaining focus on substantive challenges).

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I will call this the Basic Structure of constitutional rights. Constitutional rights are rights against rules.

The Basic Structure: Rights against Rules

A constitutional right is a legal right that is targeted against a particular rule - a rule with the wrong predicate or history. Specifically, a constitutional right furnishes the rights-holder a legal power to secure, in some measure, n50 the judicial invalidation of a particular rule. To say that X's constitutional rights have been violated entails that a reviewing court should at X's instance invalidate, in some measure, a particular rule. n51 It does not entail that any other rule should be invalidated, in any measure.

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n50. Again, "in some measure" is meant to be neutral between the Direct and Derivative Accounts. See supra note 48.

n51. This article is concerned with constitutional rights, insofar as these are enforced by reviewing courts. It remains an open question whether the concept of a judicially unenforced constitutional right is even coherent. See Adler, supra note 4, at 775-79 (discussing judicial enforcement of constitutional rights). In any event, the central problem addressed here is whether the legal rights that figure in constitutional adjudication are morally direct or derivative. That is a sufficiently discrete and salient problem, see infra section III.B (presenting institutional arguments against judicial repeal of rules), to merit separate attention.

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In particular, then, constitutional rights are not shields for actions. To say that sanctioning X pursuant to a particular rule violates her constitutional rights does not entail that the particular action at stake, by virtue of which X has been sanctioned, is constitutionally protected from being sanctioned pursuant to all other rules. n52 Similarly, to say that it violates X's constitu [*15] tional rights to subject her to the legal duty a particular rule announces does not entail that actions within the scope of that duty are constitutionally protected from coverage by all other rules.

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n52. The Basic Structure presupposes some concept of sanctioning X "pursuant to" a legal rule, such that sanctioning X "pursuant to" Rule<1> can be constitutional, while sanctioning her "pursuant to" Rule<2> can be unconstitutional. What, precisely, does this involve? The answer to that question - what it means, precisely, for state officials to be guided by a legal rule - is difficult and controversial, involving large issues about the nature of law and of rule-guided behavior. The answer I have in mind (although I believe that the arguments presented in this article for the most part do not depend upon a specific conception of rule-guidance or of law) is as follows: state officials (1) believe, or claim to believe, that X has performed an action prohibited by Rule<1> or failed to perform an action required by Rule<1>; and (2) given that eventuality, take or claim to take Rule<1> as authoritative for issuing the disadvantageous directive that constitutes X's sanction. See infra text accompanying notes 312-14 (distinguishing nonmoral fact that state officials take rules as authoritative, or claim to do so, from moral fact that the enactment of rules changes the moral reasons bearing upon officials); note 54 (defining "sanction").

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The claim I advance, in this Part of the article, is simply a descriptive claim. I claim that the Basic Structure is, in fact, our structure: that it holds true of our practice of constitutional adjudication. My claim is not that constitutional adjudication need be structured this way - structuring constitutional rights as shields for actions is certainly a conceptual possibility - nor do I claim, here, that the Basic Structure is better than an act-shielding structure. Rather, the plan of this article is to describe, in

this Part, the existing structure of constitutional rights; and then to determine, in Parts II and III, whether the Direct Account or Derivative Account provides a more plausible account of the connection between constitutional rights, thus structured, and morality.

Relatedly, note that my description of the Basic Structure is neutral between the Direct and Derivative Accounts. A constitutional right furnishes some kind of legal advantage against a particular rule. The Direct and Derivative Accounts are both consistent with, and build upon, this basic, descriptive claim. Where they differ, crucially, is as to the precise nature and moral grounding for the legal advantage that a constitutional right secures. On the Direct Account, a constitutional right advantages X by empowering her to secure the judicial invalidation of her own treatment - her own sanction or duty - by virtue of there obtaining sufficient moral reason to overturn that treatment. On the Derivative Account, a constitutional right advantages X by empowering her to secure the judicial invalidation of the rule under which her treatment falls, by virtue of there obtaining sufficient moral reason to invalidate that rule.

We shall pursue this contrast at much greater length in Parts II and III. Let us start, however, at the foundation: by seeing how constitutional rights under the Free Speech Clause, Free Exercise [*16] Clause, Equal Protection Clause, and the substantive component of the Due Process Clause, function not as shields around particular actions, but as shields against particular rules.

Why these particular provisions? I concentrate, in this article, on these provisions both because they refer to moral criteria, n53 and also because they are the main constitutional provisions by virtue of which sanctions n54 or duties can violate substantive constitutional rights. n55 Sanctions and sanction-backed duties deserve special focus [*17] because these are the most elementary and accepted sources of constitutional violations: n56 whatever else might be "unconstitutional," sanctioning an action, or coercing actors to perform or refrain from actions, surely can be. n57 Relatedly, I use the term "rule" to mean what, more precisely, might be called a "prescription" or a "conduct rule": a rule that prohibits or requires certain types of actions, that has a canonical, written formulation, that becomes legally authoritative through enactment, and that functions as a decision rule by which legal officials impose sanctions on those who perform, or fail to perform, the actions that the rule prohibits or requires. n58 By the " [*18] predicate" of a rule, I mean the description of actions contained in the rule's canonical formulation, such that actors are obliged to refrain from performing, or to perform, any particular action falling under that description, and state officials are authorized to sanction any non-complying actor. Finally, my discussion focuses upon substantive rather than procedural challenges - that is, I ignore Fourth Amendment, n59 Sixth Amendment, procedural due process, and other such challenges to the investigatory and adjudicatory procedures by which a civil or criminal sanction is imposed upon the claimant - because the theoretical as well as doctrinal problems of procedural rights are quite distinct. n60 It is enough to show in detail, as this article attempts to do, that substantive constitutional rights are better explained by the Derivative Account.

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n53. See Dworkin, Freedom's Law, supra note 1, at 7.

n54. By "sanction" I mean something like this: a legal directive, addressed to a person by name, that constitutes a disadvantage for him (paradigmatically, a legal duty to pay a fine or serve a term of imprisonment), and that state officials impose pursuant to a conduct- regulating rule. See Joseph Raz, Practical Reason and Norms 157 (1990) (noting that "most sanctions consist in the withdrawal of rights or the imposition of duties"). Sanctions can, of course, be either civil or criminal, but because free speech, free exercise, substantive due process, and equal protection doctrines are indiscriminately applied to rules backed by civil and criminal sanctions, see infra text accompanying notes 68-129 (summarizing doctrines), I will not distinguish between the two. The Derivative Account explains in a crisp way why the doctrines are indiscriminate in this manner. Conduct-regulating rules can violate liberties and breach antidiscrimination norms whether the sanctions that back them up are civil or criminal. See infra sections III.A.1-2.

n55. This leaves to one side Eighth Amendment challenges to special types of sanctions, such as the death penalty, see, e.g., Gregg v. Georgia, 428 U.S. 153, 188-207 (1976) (opinion of Stewart, Powell, and Stevens, JJ.), or the conditions of the claimant's imprisonment, see, e.g., Farmer v. Brennan, 511 U.S. 825, 832-35 (1994). The Eighth Amendment does not, under current jurisprudence, normally provide a viable basis by which to challenge an ordinary sentence of imprisonment, see Harmelin v. Michigan, 501 U.S. 957 (1991) (rejecting proportionality challenge to life sentence); see also Powell v. Texas, 392 U.S. 514 (1968) (rejecting claim that law against public intoxication prohibited mere status, and that sanction pursuant to such law therefore violated Eighth Amendment). The Eighth Amendment does prohibit excessive fines, but the jurisprudence on that is inchoate, see United States v. Bajakajian, 118 S. Ct. 2028, 2033 (1998) (holding forfeiture unconstitutional, under Excessive Fines Clause) ("This Court has had little occasion to interpret, and has never actually applied [until now], the Excessive Fines Clause."), as is the due process jurisprudence on the excessiveness of punitive damages, see BMW v. Gore, 517 U.S. 559 (1996), which likewise is not discussed here.

My statement also, clearly, leaves to one side double-jeopardy challenges, Ex Post Facto Clause challenges, and others that arise where the claimant has not merely been sanctioned pursuant to a single, preexisting rule. What we need to understand first is why, in that simple and standard case, sanctioning X under one clear and preexisting rule can violate his constitutional rights, even though his action may be wrongful under another description. See infra text accompanying notes 163-64 (further discussing double jeopardy).

Will not other parts of the Bill of Rights, along with free speech, free exercise, equal protection, and substantive due process, also advantage X in this way? In practice, the answer, currently, is no. For example, the "regulatory takings" component of the Takings Clause is certainly applicable to duty-conferring laws, such as laws for landowners, see Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); but the Takings Clause, properly understood, is not a protection against sanctions and duties. Rather, it is a complex kind of benefit-conferring provision. See, e.g., Williamson County Regl. Planning Commn. v. Hamilton Bank, 473 U.S. 172, 194 (1985) ("The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation."). As for the Establishment Clause, although that provision in theory covers conduct-regulating rules addressed to private parties, see, e.g., Tony & Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290, 305-06 (1985) (rejecting "entanglement" challenge, by religious foundation, to requirements

of Fair Labor Standards Act), in practice successful challenges to such rules are not a significant part of Establishment Clause jurisprudence.

In any event, Takings Clause and Establishment Clause challenges (and, for that matter, excessiveness challenges under the Eighth Amendment or due process) can be readily assimilated to the argument structure presented in this article. If the Basic Structure holds true of such challenges - if, for example, X's sanction can constitute a regulatory taking of his property even though the very action involved can be sanctioned under a different rule; or if X's sanction can be excessive under one rule but need not be, for the very same action, under another - then the arguments presented in Part II against the Direct Account would apply.

As for constitutional challenges to special types of sanctions (such as the death penalty, or harsh conditions of confinement), I am less sanguine that the Basic Structure holds true of such challenges, although, again, if it did the arguments presented in Part II would apply. I will not even speculate here about the relevance of such arguments to double jeopardy or ex- post-facto type challenges; that is simply too far beyond the scope of this article.

n56. Consider, by contrast, the continuing scholarly debates about the propriety of constitutional challenges to the denial of benefits. See Symposium, The Unconstitutional Conditions Doctrine, 72 Denv. U. L. Rev. 859 (1995).

n57. Joel Feinberg expresses this point elegantly at the very beginning of his famous treatise on the criminal law. In explaining why his project is to answer the question, "What sorts of conduct may the state rightly make criminal?" Feinberg explains: "My reason for restricting the inquiry to the criminal law is partly methodological. Even if one were concerned to give a complete account of social power, one would begin with the relatively blunt and visible forms of political coercion where interferences with liberty are 'writ large.'" Joel Feinberg, Harm to Others: The Moral Limits of the Criminal Law 3 (1983).

I say "coercing actors to perform or refrain from actions" rather than "imposing a duty upon actors," given the justiciability problems (within the Direct Account) raised by duties that are not clearly coercive. See infra text accompanying notes 290-92, 588-97.

n58. See Georg Henrik von Wright, Norm and Action: A Logical Enquiry 7 (1963) (defining "prescription" in this sense) ("Prescriptions are given or issued by someone. They 'flow' from or have their 'source' in the will of a norm-giver or, as we shall also say, a norm-authority. They are, moreover, addressed or directed to some agent or agents, whom we shall call norm-subject(s).... In order to make its will known to the subject(s), the authority promulgates the norm. In order to make its will effective, the authority attaches a sanction or threat of punishment to the norm."). For philosophical discussion of the different types of rules, including what I am calling "prescriptions," see id. at 1-16; Frederick Schauer, Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life 1-15 (1991); Max Black, Models and Metaphors 95-139 (1962).

Meir Dan-Cohen, in a well-known article, has explained that the conduct-regulating and decision-authorizing aspects of a prescription may come apart. The state may use one description of actions to tell the public what it

should or should not do, and another to tell its officials which actions or failures to act should be sanctioned. See Meir Dan-Cohen, Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law, 97 Harv. L. Rev. 625, 626 (1984). For ease of exposition, I assume that the state's conduct rule and decision rule are one and the same; however, nothing in my critique of the Direct Account or defense of the Derivative Account depends upon that assumption.

Rules - even the rules that the state uses to regulate conduct and impose sanctions - need not, as a conceptual matter, have a canonical formulation. See John Calvin Jeffries, Jr., Legality, Vagueness and the Construction of Penal Statutes, 71 Va. L. Rev. 189, 190-201 (1985) (describing nineteenth-century institution of common-law crimes); Schauer, supra, at 14 (noting that "specificity, conclusiveness [and] authoritative formulation [are not] necessary conditions for the existence of a mandatory rule"). Persons sanctioned by the state pursuant to a non-canonically formulated rule will have a constitutional vagueness or retroactivity claim, see Jeffries, supra, at 190-201; it is beyond the scope of this article to analyze the moral content and power of this constitutional right, and to decide whether it is itself morally direct or derivative. Assume that the right fails; X is sanctioned pursuant to a common-law rule. Then, on the Derivative Account, the judicial decision overturning X's sanction simply amounts to a repeal or amendment of the common-law rule (whether that is, in turn, styled an interpretation of the rule, or an override). That would be my construal, for example, of Cantwell v. Connecticut, 310 U.S. 296, 307-11 (1940) (overturning, on free speech grounds, conviction of speaker for common law breach of the peace).

n59. For an illuminating analysis, in the Fourth Amendment context, of a problem (Why do guilty persons have a Fourth Amendment right against unreasonable searches?) quite parallel to the problem discussed here (Why do persons who are guilty under some description have substantive constitutional rights against being sanctioned or coerced pursuant to the wrong kind of rules?), see Sherry F. Colb, Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence, 96 Colum. L. Rev. 1456 (1996).

n60. In general, procedures are valuable either instrumentally (as a mechanism by which to secure good outcomes) or because of the intrinsic value of participation. See Jerry L. Mashaw, Administrative Due Process: The Quest for a Dignitary Theory, 61 B.U. L. Rev. 885, 886 (1981); Robert S. Summers, Evaluating and Improving Legal Processes - A Plea for "Process Values," 60 Cornell L. Rev. 1, 4 (1974). The substantive rights under discussion here have a moral grounding that is, I believe, at least partly distinct from this moral grounding for procedural rights. See infra sections III.A.1-2. And even if this is untrue, see John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 73-104 (1980) (presenting "process theory" of constitutional rights), the problem of explaining why a constitutional right can be violated by virtue of a flawed rule-predicate whose application by enforcement officers and courts is procedurally perfect, will prove sufficiently complex to merit separate attention.

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*** It is hard to imagine a crisper formulation of the proposition that constitutional rights do not shield actions than the following passage from Supreme Court's opinion in the R.A.V. n61 case.

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n61. R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

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[*19]

The proposition that a particular instance of speech can be proscribable on the basis of one feature (e.g., obscenity) but not on the basis of another (e.g., opposition to the city government) is commonplace and has found application in many contexts. We have long held, for example, that nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses - so that burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not. Similarly, we have upheld reasonable "time, place, or manner" restrictions, but only if they are "justified without reference to the content of the regulated speech." And just as the power to proscribe particular speech on the basis of a noncontent element (e.g., noise) does not entail the power to proscribe the same speech on the basis of a content element; so also, the power to proscribe it on the basis of one content element (e.g., obscenity) does not entail the power to proscribe it on the basis of other content elements. n62

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n62. 505 U.S. at 385-86 (citations omitted) (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

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This passage describes not just the Free Speech Clause of the First Amendment, but all the provisions of the Bill of Rights that, within current constitutional jurisprudence, secure judicial protection for actors from sanctions and sanction-backed duties.

Let us begin with free speech. The Free Speech Clause concerns a special kind of action: a speech-act. Speech-acts, like actions more generally, are what philosophers call "particulars" or "tokens." n63 That is, an action is a particular thing - specifically, a particular bodily movement - that can be picked out under different descriptions, which describe the various properties that one and the same bodily movement has. n64 "Property," here, denotes some type, or class, of bodily movements - for example, the type, or class, of bodily movements that cause a certain kind of effect, or that constitute a certain kind of event. n65 A particular finger-pulling of yours can, at once, be an action of "shooting a gun," "killing a human being," "disturbing the neighbors," and "stopping an in [*20] truder," all of which descriptions refer to the diverse states or events that the very same finger-pulling causes or constitutes. n66 Similarly, a particular mouth movement of yours (performed, say, during an anti-war demonstration in a public park) can, at once, be an action of "protesting the war," "offending the bystanders," "disturbing the wildlife," and "breaking windows" (if your pitch is sufficiently shrill). A particular

hand-motion of yours can, at once, be an action of "striking a match," "burning acrylic," "desecrating a flag," and "battering a bystander." n67

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n63. On the distinction between "tokens" or "particulars," and "types" or "universals," see D.M. Armstrong, Universals: An Opinionated Introduction 1-7 (1989).

n64. See Michael S. Moore, Act and Crime: The Philosophy of Action and its Implications for Criminal Law 60-77, 280-301 (1993) (analyzing actions as particulars); id. at 78-112 (arguing that each particular action is a particular volition-caused bodily movement). Although the so-called "coarse-grained" view of actions as particulars is not a universal one, see Robert Audi, Action, Intention, and Reason 2 (1993) (describing coarse- grained view as "more widely held, and perhaps dominant, at present"), a legal right that protected one and the same action from sanction pursuant to different rules would, necessarily, presume a coarse-grained view. It would identify some particular, dynamic human thing (call it a "shmaction," if indeed "actions" are fine-grained) that no rule could pick out.

n65. See Armstrong, supra note 63, at 1-7.

n66. See, e.g., R.A.V., 505 U.S. at 379-81 (speech-act also action of trespass); United States v. Eichman, 496 U.S. 310, 313 n.1 (1990) (speech-act also action of injuring federal property); Ward v. Rock Against Racism, 491 U.S. 781, 784-90 (1989) (speech-act also action of causing loud noise); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 291-92 (1984) (speech-act also action of camping); United States v. O'Brien, 391 U.S. 367, 369-70 (1968) (speech-act also action of destroying government documents).

n67. It might be objected, again, that I am assuming an unduly coarse-grained view of act individuation. It is consistent with the status of actions as particulars to say that, where the same bodily movement falls under two radically different types, we have not one but two actions. It might be the case that some, but not all, of the different properties that a particular bodily movement has are properties of the same action. See Moore, supra note 64, at 366-74. I believe, however, that the most plausible act-shielding constitutional right would be significantly coarse-grained, in this sense: it would delineate some type of action sufficiently important or harmless that actors, or certain actors (e.g., black actors), should be free to perform it. But how is the freedom of actors to perform a type of action violated? It is violated by coercing them not to perform the bodily movement that instantiates the action, or sanctioning them by virtue of that bodily movement. So, whether or not the rule-predicate pursuant to which that bodily movement is coerced and sanctioned picks out the same "action," for nonlegal purposes, it would for purposes of our act-shielding right.

For this reason, in my descriptive efforts I focus on showing that sanctioning or coercing the very same (significantly) coarse-grained action can be unconstitutional under one description and constitutional under another. But, in any event, my descriptive claims are equally true, I think, on a more moderately coarse-grained view. Otherwise, why would constitutional challenges be styled as facial or as-applied challenges to particular rules? See infra text accompanying notes 133-34. Therefore, I will not belabor the point through a

separate discussion of the moderately coarse-grained view.

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So a speech-act, like any action, has multiple properties. n68 By definition, one property that a speech-act has is the property of communicating, of "expressing," a statement. But a speech-act always also has some nonexpressive property - at a minimum, an innocuous property like producing sound waves, or darkening paper. And sometimes, as in the action of burning a flag, or sabotaging military production to protest the war, or performing a "symbolic" assassination, the nonexpressive properties of a speech- act - its causal or constitutive connection to states or events, independent of the fact that the act-token is communicative - can be quite morally serious. Thus it has long been a staple of First Amendment jurisprudence, as R.A.V. rightly explains, that a speech-act can be sanctioned or prohibited by a rule whose predi [*21] cate picks out certain nonexpressive properties of actions, even though sanctioning or prohibiting the very same speech-act under a rule whose predicate picks out certain expressive act-properties would be unconstitutional.

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n68. Or, more generally, like any token. See Armstrong, supra note 63, at 1-7.

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The leading case for this doctrine is United States v. O'Brien. n69 Mr. O'Brien burned his draft card on the steps of a federal courthouse as an act of political protest against the Vietnam War, and was prosecuted and convicted pursuant to a federal statute that prohibited destroying or mutilating draft cards. n70 The Supreme Court upheld O'Brien's conviction, n71 despite the assumed expressive cast of his particular action of draft-card-destruction. n72 The Court's reasoning centered on the predicate of the particular statute pursuant to which O'Brien was convicted.

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n69. 391 U.S. 367 (1968).

n70. See O'Brien, 391 U.S. at 369-70.

n71. See 391 U.S. at 386.

n72. See 391 U.S. at 376 ("Even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity.").

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This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First

Amendment freedoms.... Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it ... furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. n73

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n73. 391 U.S. at 376-77 (emphasis added).

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In short, Mr. O'Brien's conviction satisfied the First Amendment because the act-property set forth by the statute's predicate was a (sufficiently important) nonexpressive property of actions: the property of causing draft cards to be damaged. n74 Had O'Brien, instead, been convicted for violating a rule that prohibited draftees [*22] from "protesting the war," or "desecrating draft cards," his conviction would certainly have been unconstitutional. Although First Amendment doctrine is dense and complicated, it is at least clear that certain rules that pick out expressive act-properties - specifically, rules that are "content-based" - are subject to intensive scrutiny and are almost always unconstitutional. n75 This was the case, for example, in Texas v. Johnson. The statutory term "flag desecration" picked out an expressive property of actions - to desecrate a flag is, necessarily, to perform a bodily movement that communicates disrespect - and triggered strict scrutiny by the Court. n76

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n74. See 391 U.S. at 382 ("In conclusion, we find that because of the Government's substantial interest in assuring the continuing availability of issued Selective Service certificates, because amended 462(b) is an appropriately narrow means of protecting this interest and condemns only the independent noncommunicative impact of conduct within its reach, and because the noncommunicative impact of O'Brien's act of burning his registration certificate frustrated the Government's interest, a sufficient governmental interest has been shown to justify O'Brien's conviction."). The O'Brien reference to the government's "substantial interest" implies that rules picking out insignificant nonexpressive act-properties might be invalid, insofar as these include speech-acts within their scope. I believe this is indeed the correct interpretation of the Free Speech Clause and the Court's free speech case law. See infra text accompanying notes 354-64.

n75. See, e.g., Boos v. Barry, 485 U.S. 312, 321 (1988); see also Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 123-27 (1991) (arguing that, in general, content-based laws should not be subject to "compelling interest" scrutiny but rather should be automatically unconstitutional).

n76. Although the Court initially pointed out that Texas had defined "desecration" in a way that left open the possibility of nonexpressive desecration, see Texas v. Johnson, 491 U.S. 397, 403 n.3 (1989) (defining "desecration" as physical mistreatment of flag that causes serious offense),

the Court's subsequent analysis belied this point and took "desecration" (even as defined by Texas) to be expressive. See 491 U.S. at 412 (holding that Texas statute is "content-based" because the offensive cast of expressive flag-desecration is not a secondary effect, unrelated to its expressive cast).

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Consider what the First Amendment would look like if O'Brien's distinction between rules whose predicates pick out nonexpressive versus expressive properties of actions did not obtain. Either speech-acts with seriously harmful nonexpressive characteristics, such as expressive burnings, sabotages, assassinations, and so forth, would be constitutionally protected: someone who was speaking as well as harming would have a successful First Amendment defense to a prosecution for battery, property- destruction, or homicide. Alternatively, expressive burnings, acts of sabotage, or assassinations could be sanctioned pursuant to grossly overbroad or discriminatory laws that prohibited, say, "offensive utterances," "language disrespectful to the Nation," or "the making of a misleading statement about the President, by a registered member of the Independent Party." n77

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n77. For a cogent statement of the First Amendment distinction between rules picking out nonexpressive versus expressive properties of speech-acts, see Alexander, supra note 7, at 545 (" 'Criticizing the government' is not protected conduct viewed in isolation from the various ways government might attempt to regulate 'criticizing the government.' 'Criticizing the government' may be validly - constitutionally - regulated if the criticism is broadcast from a soundtruck at night, and the regulation proscribes the use of soundtrucks at night.... But 'criticizing the government' is not validly regulated if the regulation proscribes, or was motivated by a desire to proscribe, 'criticizing the government.' ").

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Besides the O'Brien distinction between the expressive and nonexpressive properties of speech-acts, there is a second distinc [*23] tion, relevant here, within First Amendment jurisprudence. That is the distinction between low-value and full-value speech. The classic low-value categories are obscenity, incitement, "fighting words," and libel. n78 What this means is that a speech-act token falling within a low-value category - the action of displaying a sexually prurient, patently offensive movie that lacks serious literary, artistic, political or scientific value; n79 or inciting a crowd, with likely success, to imminent lawless action; n80 or uttering a face-to-face insult that, by its very utterance, tends to cause an immediate breach of the peace; n81 or knowingly stating an injurious falsehood about another person n82 - can be sanctioned pursuant to an appropriate rule. But it has long been a fixture of the Court's First Amendment jurisprudence that sanctioning a low-value speech-act pursuant to the wrong kind of rule will be unconstitutional. The doctrine that expresses this proposition, of course, is the First Amendment "overbreadth" doctrine. n83

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n78. See R.A.V. v. City of St. Paul, 505 U.S. 377, 382-83 (1992); Simon & Schuster, 502 U.S. at 127 (Kennedy, J., concurring in the judgment).

n79. See Miller v. California, 413 U.S. 15, 24-25 (1973).

n80. See Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

n81. See Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). The Chaplinsky Court defines fighting words disjunctively to include also speech-acts which "by their very utterance inflict injury," 315 U.S. at 572, but whether the First Amendment category of fighting words truly includes non-peace-breaching, injurious speech-acts is seriously questionable after R.A.V.

n82. See New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).

n83. For scholarly discussions of the overbreadth doctrine, see Alexander, supra note 7; Richard H. Fallon, Jr., Making Sense of Overbreadth, 100 Yale L.J. 853 (1991); Alfred Hill, The Puzzling First Amendment Overbreadth Doctrine, 25 Hofstra L. Rev. 1063 (1997); Monaghan, supra note 44; Martin Redish, The Warren Court, the Burger Court and the First Amendment Overbreadth Doctrine, 78 Nw. U. L. Rev. 1031 (1983); Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844 (1970).

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In [overbreadth] cases, an individual whose own speech ... may validly be prohibited or sanctioned is permitted to challenge a statute on its face because it also threatens others not before the court - those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid. If the overbreadth is "substantial," the law may not be enforced against anyone, including the party before the court, until it is narrowed to reach only unprotected activity n84

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n84. Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 503 (1985).

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So, for example, to use the exemplary case of Gooding v. Wilson, n85 it violated the First Amendment to sanction a political protester pursuant to a statute prohibiting "'[the utterance of] opprobrious [*24] words or abusive language'" n86 - given the breadth of the statutory terms "opprobrious" and "abusive" - even though what the protester in fact had said, to a police officer, was, "White son of a bitch, I'll kill you." n87 Or, to switch from "fighting words" to obscenity, it would presumably violate the First Amendment to sanction X pursuant to a law generally prohibiting the display of "pictures of children not fully clothed" - given the umpteen nonpornographic pictures of this kind that parents display - even if X himself is a child pornographer.

n88 Similar examples could readily be constructed for incitement n89 and libel.

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n85. 405 U.S. 518 (1972).

n86. Wilson, 405 U.S. at 519 (quoting Ga. Code. Ann. 26.6303 (Harrison Supp. 1971)).

n87. 405 U.S. at 520 n.1 (citing Wilson v. State, 156 S.E.2d 446, 449 (Ga. 1967)); see also Lewis v. City of New Orleans, 415 U.S. 130 (1974) (invalidating Louisiana ordinance that made it unlawful to "curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police," where speaker allegedly cursed and screamed at police officer (citing New Orleans, La., Ordinance 828 M.C.S. 49-7 (1972)).

n88. Surely this would be true if "not fully clothed" were defined to include the display of any body part except for the head, arms, or feet. See Massachusetts v. Oakes, 491 U.S. 576, 590 (1989) (Brennan, J., dissenting) (arguing that statute prohibiting nude or sexual photographs, etc., of children, with nudity defined only to include genitals, pubic areas, and postpubertal female breasts, is overbroad); cf. Osborne v. Ohio, 495 U.S. 103, 112-14 (1990) (rejecting overbreadth challenge to statute regulating child pornography, by virtue of statute's predicate requiring more than nudity); New York v. Ferber, 458 U.S. 747, 764-74 (1982) (same).

More generally, as the Court has stated in Miller, the foundational obscenity case: "State statutes designed to regulate obscene materials must be carefully limited.... [Obscene] conduct must be specifically defined by the applicable state law, as written or authoritatively construed." Miller v. California, 413 U.S. 15, 23-24 (1973) (footnote omitted). The obscene cast of the claimant's own conduct is not a sufficient condition for his constitutional claim to fail.

n89. See Brandenburg v. Ohio, 395 U.S. 444, 448-49 (1969) (scrutinizing predicate of criminal syndicalism statute, and invalidating statute because it covered actions not within the narrow category of incitement).

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The reader familiar with the First Amendment overbreadth doctrine, and the Court's conceptualization thereof, may protest at this point that the application of an overbroad rule to an assaultive protester, or a child pornographer, or another such actor X whose own speech is proscribable under a different rule, does not actually involve the violation of X's "constitutional rights." Rather, this reader may explain, overturning X's sanction is simply a prophylactic measure designed to protect other, innocent speakers falling under the same rule as X. n90 But this response misconstrues what I mean by "constitutional right." The response assumes that constitutional rights necessarily have a special and robust moral content; X's constitutional rights can only be violated, the response assumes, [*25] if moral wrong was done to X. I do not mean to assume that. Rather, by "constitutional right," I simply mean a legal right (technically, a legal power) to secure the judicial invalidation, in some measure, of one or more rules (of a particular rule on the rule- centered view, or of all rules covering a particular action on the act-shielding view). n91 This concept of a "constitutional right" is both

plausible and deliberately catholic. It is, by design, consistent with both the Direct Account and the Derivative Account, and leaves open, for further debate, what the moral content of constitutional rights truly is. The Direct Account ought not triumph at the definitional stage, by defining "constitutional right" to exclude the very possibility of constitutional rights having derivative moral content.

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n90. See, e.g., Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 503-04 (1985) (explicating overbreadth as a special prophylactic doctrine that obtains where the speaker's own constitutional rights are not violated); Ferber, 458 U.S. at 769-70 (1982) (same); Broadrick v. Oklahoma, 413 U.S. 601, 611-13 (1973) (same).

n91. See supra note 45 and accompanying text; infra text accompanying notes 434-39.

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And it is, further, clear that "constitutional rights," as here catholically defined, do not have an act-shielding structure in the overbreadth context. The assaultive protester has a constitutional right, in my sense, to secure the invalidation of her sanction pursuant to an overbroad rule prohibiting "opprobrious words or abusive language"; neither she nor anyone else has a constitutional right to secure the invalidation of her sanction, for the very same action, imposed pursuant to a narrowly tailored rule prohibiting fighting words. The child pornographer has a constitutional right, in my sense, to secure the invalidation of her sanction pursuant to an overbroad rule prohibiting all pictures of unclothed children; neither she nor anyone else has a constitutional right to secure the invalidation of her sanction, for the very same action, imposed pursuant to a narrowly tailored rule prohibiting child pornography.

The First Amendment case that ties together all the doctrine I have just summarized, and shows, better than any other, how free speech rights are not act-shielding, is the R.A.V. case itself. In R.A.V., a speaker whose speech-act was doubly bad - not only was the speech-act an instance of low-value speech, but it also possessed harmful nonexpressive properties - nonetheless secured the invalidation of his indictment. This particular speaker, a teenager, had decided to express his views by burning a cross on the front yard of a black family who happened to live across the street from him. n92 The teenager was prosecuted for breaching a Minnesota ordinance that broadly prohibited racist, sexist, and anti-religious expression: " 'Whoever places on public or private property a symbol, object, appellation, characterization or graffiti [which] arouses anger, [*26] alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.' " n93 The teenager's particular action was an action of trespass and perhaps arson, n94 and also, the entire Court assumed, of uttering "fighting words." n95 But the entire Court also agreed (on differing rationales) n96 that sanctioning the teenager pursuant to the particular statute Minnesota had chosen would be unconstitutional. The entire Court concurred in overturning the indictment of our doubly harmful teenager, by virtue of the Minnesota statute's flawed predicate.

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n92. See R.A.V. v. City of St. Paul, 505 U.S. 377, 379-80 (1992).

n93. 505 U.S. at 380 (citing St. Paul, Minn., Legis. Code 292.02 (1990)).

n94. See 505 U.S. at 380 n.1.

n95. See 505 U.S. at 381; 505 U.S. at 402 (White, J., concurring in the judgment); 505 U.S. at 432 (Stevens, J., concurring in the judgment).

n96. The majority overturned the teenager's indictment, on the assumption that the ordinance had been narrowed to cover a content-based and viewpoint-based subset of "fighting words." See 505 U.S. at 391-96. The concurring Justices agreed that the teenager's indictment should be overturned, but their rationale was that the ordinance was overbroad, by including speech-acts that were not "fighting words." See 505 U.S. at 411-15 (White, J., concurring in the judgment).

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In sum, First Amendment cases like Texas v. Johnson, O'Brien, the overbreadth cases, and R.A.V. show unequivocally that free speech rights do not possess an act-shielding structure. In theory, one might think, constitutional liberties such as liberty of speech should indeed have an act-shielding structure. What a constitutional liberty should do, one might claim, is to shield from all rules particularly important actions - those actions falling within the category defined by the liberty (for example, full-value expression, or religiously motivated conduct) that do not have overriding, harmful properties. n97 But our actual constitutional practices belie this claim. It is unsurprising then, that when we move from liberties to equality - from the Free Speech to the Equal Protection Clause - our practices remain rule-centered rather than act-shielding. For if constitutional liberties do not give rise to protective shields around actions, then a fortiori constitutional guarantees, such as the Equal Protection Clause, that have nothing to do with important types of actions, should not.

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n97. Cf. infra text accompanying notes 315-33 (discussing true nature of constitutional "liberties").

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And indeed the Equal Protection Clause does not. "Discriminatory purpose" has, for some time now, been the touchstone of equal protection analysis. A rule has a "discriminatory purpose," within equal protection law, if the rule-predicate refers explicitly to particular races, genders, or other "suspect" classes, or if the legislators [*27] intended the rule to have a disparate impact along suspect lines. n98 Having a "discriminatory purpose" is close to n99 a necessary condition for a successful equal protection challenge. n100 A rule that merely has a disparate impact, not a "discriminatory purpose," will not violate the Equal Protection Clause. This doctrine stems from the Court's well-known decision in Washington v. Davis, n101 where it upheld a qualifying exam for D.C. police officers, even though blacks were disqualified

by the test in disproportionate numbers; and from the extension of Davis to gender in the Feeney case, n102 which upheld Massachusetts's civil service preference for veterans, even though virtually all veterans in Massachusetts were men.

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n98. See FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993) ("[A] statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."); Personnel Admr. v. Feeney, 442 U.S. 256, 271-80 (1979) (holding that rule that employs a nonsuspect predicate will still trigger heightened scrutiny under the Equal Protection Clause, but only if predicate was selected, by rule-formulator, because of rule's adverse effects on a suspect class).

Beach also adverts here to the possibility of an equal protection challenge enhanced by the presence of fundamental rights. The Court has indeed recognized discrimination-type challenges in the area of fundamental rights, but, most recently - at least with respect to conduct-regulating rules - it has proceeded directly under the relevant fundamental right, and has not relied upon the Equal Protection Clause. See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (free exercise); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (free speech).

n99. I say "close to" because the Court has, on occasion, invalidated statutes under the rational-basis prong of equal protection scrutiny. See, e.g., Romer v. Evans, 517 U.S. 620 (1996); Allegheny Pittsburgh Coal Co. v. County Commn., 488 U.S. 336 (1989); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985); Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985); Zobel v. Williams, 457 U.S. 55 (1982); United States Dept. of Agric. v. Moreno, 413 U.S. 528 (1973). Such cases, or at least some of them, can be understood as involving "suspect" classes that the Court was unwilling to label as such - for example, the class of new state residents in Hooper and Zobel, the class of homosexual persons in Romer, and the class of mentally retarded persons in Cleburne.

n100. It will be sufficient if the interest behind the rule lacks enough importance to justify purposeful discrimination. See, e.g., Craig v. Boren, 429 U.S. 190, 197 (1976) ("classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives").

n101. 426 U.S. 229 (1976).

n102. Feeney, 442 U.S. 256 (1979).

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To construe the Equal Protection Clause as act-shielding would eviscerate the doctrines here described. As an illustration, consider Craig v. Boren, n103 perhaps the leading example of an equal protection challenge to a conduct-regulating rule (the type of rule discussed in this article). An Oklahoma statute prohibited the sale of low-alcohol beer to minors, with a

"minor" defined as a man under the age of twenty-one, and a woman under the age of eighteen. n104 [*28] A vendor of low-alcohol beer brought an anticipatory challenge to the statute. The Court sustained her challenge, finding an insufficient connection between gender and the state's claimed objective - traffic-safety - to justify the statute's explicit gender classification. n105 The vendor was constitutionally free from the particular legal duty to which the gender-discriminatory statute purported to subject her. But this could hardly mean, given Davis and Feeney, that the vendor was also free from the duties to which a host of gender-neutral rules might subject her, and under which her (various) actions of selling low-alcohol beer to minors might fall: for example, a rule requiring her to possess a valid license, to refrain from selling alcohol to someone obviously intoxicated, or to sell alcohol for take-away consumption only in closed containers. n106

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n103. 429 U.S. 190 (1976).

n104. See Craig, 429 U.S. at 191-92.

n105. See 429 U.S. at 199-204.

n106. Here, as in the overbreadth context, the point that the vendor was not asserting "her own" constitutional rights, but instead was asserting (under the rubric of jus tertii) the constitutional rights of others - male purchasers of low-alcohol beer, see 429 U.S. at 192-97 (holding that vendor had jus tertii standing) - is misplaced. The vendor did have a constitutional right in my minimal sense: a legal right to secure the invalidation, in some measure, of the rule that purported to impose a duty upon her. See supra text accompanying notes 90-91 (discussing this issue in the overbreadth context).

In any event, my point would also hold for a rule that penalized the purchase of alcohol by men between 18 and 21. Clearly, overturning a young man's sanction or duty pursuant to this rule would not entail that he had a general constitutional immunity for otherwise-illegal actions of purchasing alcohol.

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Indeed, the Court in Craig v. Boren made clear that Oklahoma could cure the defect in its statute by widening the statutory duty, so as necessarily to include within its scope every single action covered by the now-discriminatory duty. "The Oklahoma Legislature is free to redefine any cutoff age for the purchase and sale of [low- alcohol beer] that it may choose, provided that the redefinition operates in a gender-neutral fashion." n107 Sanctioning the vendor for breaching a rule that banned sales to women as well as men under the age of twenty-one would not violate the vendor's constitutional rights, or anyone else's. This is a tight, logical consequence of the doctrinal focus on discriminatory purpose; but note that it would hold true even if the doctrine were changed to make either disparate impact or discriminatory purpose the basis for an equal protection violation. The concept of disparate impact, like the concept of discriminatory purpose, takes as its referent a particular rule. n108 It [*29] concerns whether that rule falls more heavily on blacks rather than whites, men rather than women. So imagine that our vendor in Craig successfully challenged some gender-neutral rule on the grounds of its disparate impact (say, a rule prohibiting the sale of certain beverages disproportionately consumed

by men). She would still be subject to existing gender-neutral rules lacking that disparate impact, as well as to a widened version of the unconstitutional rule - widened so as to eliminate the disparate impact.

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n107. Craig, 429 U.S. at 210 n.24 (emphasis added).

n108. See Owen M. Fiss, Groups and the Equal Protection Clause, 5 Phil. & Pub. Aff. 107, 147-69 (1976). Fiss provides a theoretical defense of disparate-impact-type scrutiny, by arguing in favor of what he calls the "group disadvantaging principle": "[A] state law or practice [that] aggravates ... the subordinate position of a specially disadvantaged group ... is what the Equal Protection Clause prohibits." Id. at 157.

It is, in theory, possible to construct an act-shielding doctrine under the Equal Protection Clause. Certain otherwise-proscribable actions, if performed by blacks, would be constitutionally immune; blacks' freedom to perform such actions could be conceptualized as a resource to which they have a special claim, by virtue of distributive or reparative justice, or by virtue of an anti-caste principle, or whatever. But this is not what Fiss argues for, or what the concept of disparate impact involves. See Personnel Admr. v. Feeney, 442 U.S. 256, 259-61 (1979) (describing claimant's disparate-impact challenge to statutory provision establishing preference for veterans); Washington v. Davis, 426 U.S. 229, 232-38 (1976) (describing claimants' disparate-impact challenge to various hiring practices, in particular a qualifying test, employed by the District of Columbia).

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So much for the Free Speech and Equal Protection Clauses of the Bill of Rights. The Free Exercise Clause can be handled quickly. As a consequence of the Court's decision in the seminal case of Employment Division v. Smith, n109 free exercise doctrine is now closely isomorphic to equal protection doctrine and roughly isomorphic to free speech doctrine. n110 The Court in Smith held that Native Americans who had used peyote as part of the ceremony of a Native American church, and as a result were dismissed from their jobs for illegal drug use, could be denied state unemployment benefits. n111 The right to religious freedom, the Court announced, simply protected actors from being sanctioned or coerced pursuant to non-neutral rules. Non-neutral rules, here, are those that explicitly pick out religious properties of actions - for example, that the [*30] action is performed for religious purposes, or by the members of a particular religious group.

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n109. 494 U.S. 872 (1990).

n110. I say "roughly" rather than perfectly isomorphic to free speech doctrine, because rules picking out nonexpressive act properties are, at least officially, subject to heightened scrutiny under the Free Speech Clause, see supra text accompanying note 73 - properly so, see infra text accompanying notes 354-64 - while neutral laws are not subject to heightened equal protection or free exercise scrutiny. I say "closely" rather than perfectly isomorphic to equal protection doctrine because of a special proviso that the Court deployed

in Smith, and reaffirmed in City of Boerne v. Flores, 117 S. Ct. 2157 (1997), to explain its earlier unemployment-compensation cases: "'Where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of religious hardship without compelling reason.'" Boerne, 117 S. Ct. at 2161 (quoting Smith, 494 U.S. at 884). The existence of this special proviso does not materially undermine the isomorphism between free exercise and equal protection doctrine, for purposes of this article. Post-Smith, sanctioning or coercing an action under a religiously discriminatory rule will violate the Constitution even though sanctioning or coercing the very same action under a neutral rule that lacks the requisite "system of individual exemptions" will not.

n111. See Smith, 494 U.S. at 890.

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[Our] decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." n112

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n112. 494 U.S. at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)); see Boerne, 117 S. Ct. at 2160-61 (reaffirming Smith).

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Post-Smith, the religious cast of a particular action will not, under the Constitution, work to exempt that action from a rule the predicate of which describes actions in nonreligious terms n113 - just as, under the Equal Protection Clause, actors are not exempt from race-neutral or gender-neutral laws and, under the O'Brien portion of First Amendment jurisprudence, speakers can generally be regulated by rules picking out nonexpressive properties of their actions. Thus the rule-centered - rather than act-protecting - structure of free speech and equal protection doctrine holds true, mutatis mutandis, for free exercise.

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n113. With the special exception noted above, see supra note 110.

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Finally, constitutional doctrine in the area of substantive due process quite clearly fits the Basic Structure. Here, as elsewhere, constitutional challenges - whether anticipatory challenges by would-be actors, or retrospective challenges by actors who already have been sanctioned - are structured as challenges to particular rules. This is so natural to constitutional lawyers, scholars, and jurists, that the Court without pause or comment adopted a rule-

centered approach in the seminal, post-New Deal substantive due process cases: Griswold v. Connecticut n114 and Roe v. Wade. n115 Griswold was a retrospective, individual challenge by Dr. Griswold and another doctor, who had been tried and convicted in state court for prescribing contraceptives in violation of a Connecticut criminal statute that prohibited " 'using any drug, medicinal article or instrument for the purpose of preventing contraception,' " or assisting others in doing so. n116 Roe was an anticipatory, class-action challenge by the pseudonymous Jane Roe and others, who brought a declaratory and injunctive suit in federal district court against the Texas abortion statutes, which criminalized " 'procuring an abortion' " except for those " 'procured ... by medical advice for the [*31] purpose of saving the life of the mother.' " n117 In each case, the Court focused on the particular statute against which it took, respectively, Dr. Griswold's and Ms. Roe's claims to be targeted. Specifically, the Court in each of these cases asked whether the particular statute at issue was narrowly tailored - a concept familiar from free speech jurisprudence. n118 To quote the analysis in Griswold:

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n114. 381 U.S. 479 (1965).

n115. 410 U.S. 113 (1973).

n116. Griswold, 381 U.S. at 480 (quoting Conn. Gen. Stat. Ann. 53-32 (West 1958)).

n117. Roe, 410 U.S. at 117 n.1 (quoting Tex. Penal Code Ann. arts. 1192, 1196).

n118. See Griswold, 381 U.S. at 485 (citing free speech case law for narrow-tailoring analysis); Roe, 410 U.S. at 155 (citing substantive due process, free speech, and other fundamental rights case law for narrow-tailoring analysis).

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The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." n119

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n119. Griswold, 381 U.S. at 485 (quoting NAACP v. Alabama ex rel. Flowers, 377 U.S. 288, 307 (1964)).

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The narrow-tailoring approach in Roe was identical:

Where certain "fundamental rights" are involved, the Court has held that regulation limiting these rights may be justified only by a "compelling state interest," and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.

....

Measured against these standards, [the Texas statute], in restricting legal abortions to those "procured or attempted by medical advice for the purpose of saving the life of the mother," sweeps too broadly. The statute makes no distinction between abortions performed early in pregnancy and those performed later, and it limits to a single reason, "saving" the mother's life, the legal justification for the procedure. The statute, therefore, cannot survive the constitutional attack made upon it here. n120

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n120. Roe, 410 U.S. at 155, 164 (citations omitted).

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Because the Connecticut statute at stake in Griswold failed the Court's narrow-tailoring test, the Court overturned the sanctions of Dr. Griswold and his fellow physician that had been meted out pursuant to that statute. n121 There was only a brief description of the particular actions that these doctors had performed; n122 and it was surely not an entailment of the holding in Griswold that the doctors [*32] were constitutionally immune from being sanctioned, under any statute, for those particular actions. What if the notation Dr. Griswold used on his prescription form was a secret message to the pharmacist that constituted blackmail or extortion on an unrelated matter? What if the forms Griswold used had been stolen from the government? What if he prescribed more expensive contraceptive C rather than cheaper contraceptive D, as part of a price-fixing scheme with other doctors and the drug companies? The Court in Griswold did not need to confront these possibilities - it did not need to undertake a complete description of all the morally relevant properties of Dr. Griswold's actions n123 - because Dr. Griswold's substantive due process right was rule-centered, not act- shielding. It protected him from being sanctioned pursuant to the no-contraception rule; it did not protect him from being sanctioned pursuant to all the rules under which his actions of prescribing contraceptives might fall.

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n121. See Griswold, 381 U.S. at 486.

n122. See 381 U.S. at 480-81.

n123. See David Lyons, Forms and Limits of Utilitarianism 30-61 (1965) (analyzing concept of complete moral description of particular action).

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As for the decision in Roe: when the Court upheld the entry of anticipatory relief prohibiting any enforcement of the Texas no- abortion statute, n124 this holding clearly did not entail that every action within the scope of that statute was immune from coverage by every rule. The very point of the famous trimester analysis of Roe was to make clear that a state could proscribe and sanction post- viability abortions absent a threat to the mother's life or health. n125 A future actor who procured a post-viability abortion could not be sanctioned by Texas pursuant to the particular overbroad rule targeted and invalidated in Roe, n126 but that actor could be sanctioned for the very same action if Texas in the interim had responded to Roe by enacting a more narrowly tailored no-abortion statute limited to post-viability abortions not involving maternal life or health.

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n124. See Roe, 410 U.S. at 166-67.

n125. See 410 U.S. at 162-66.

n126. See 410 U.S. at 166 ("The Texas abortion statutes, as a unit, must fall.... We find it unnecessary to decide whether the District Court erred in withholding injunctive relief [and merely entering declaratory relief], for we assume the Texas prosecutorial authorities will give full credence to this decision that the present criminal abortion statutes of that State are unconstitutional.").

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The post-Roe and -Griswold substantive due process cases are similarly structured as challenges to particular rules rather than to the sanctioning or coercing of particular actions. n127 I will not test [*33] the reader's patience by discussing the facts and reasoning of these decisions here, beyond noting that the recent landmark decision in Casey n128 was, like Roe, an anticipatory class action in which the Court facially invalidated a particular state law - a Pennsylvania statute prohibiting doctors from performing an abortion on a married woman without receiving a signed statement of spousal consent from her. n129 To spin out the familiar story: the holding in Casey protects Pennsylvania physicians from being sanctioned pursuant to this particular rule; but it does not entitle them to perform abortions that not only violate the rule but are also wrongful under another description, for example, because the physician's license elapsed, or because the physician failed to secure the woman's consent, and so on.

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n127. Some exemplary and prominent cases, besides Casey, are Webster v. Reproductive Health Services, 492 U.S. 490 (1989) (regulation of abortion); Bowers v. Hardwick, 478 U.S. 186 (1986) (regulation of sodomy); Moore v. City of East Cleveland, 431 U.S. 494 (1977) (family unity); and the recent assisted suicide cases, Vacco v. Quill, 117 S. Ct. 2293 (1997), and Washington v.

Glucksberg, 117 S. Ct. 2258 (1997).

n128. Planned Parenthood v. Casey, 505 U.S. 833 (1992). The Court in Casey moved from Roe's narrow-tailoring test for laws regulating abortion, to an "undue burden" test, principally to permit pre-viability measures aimed to protect fetal life, see 505 U.S. at 868-79, but this does not change the rule-centered cast of the Casey decision itself or of abortion doctrine more generally.

n129. See 505 U.S. at 887-98.

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*** This descriptive survey of constitutional doctrine under the relevant portions of the Bill of Rights should suffice, I hope, to show that constitutional rights are not act-shielding, or even remotely like that. n130 But the observant reader might complain that, by demonstrating this negative claim, I have not yet demonstrated the positive claim that constitutional rights are rights against particular rules. There is logical space between having rights shield particular actions from all the rules under which the actions fall, and having rights that are targeted against particular rules. A constitutional right might be targeted, not against a particular rule but against some class of rules different from the class targeted by an act-shielding right. For example, constitutional adjudication might be structured such that a constitutional right empowers the claimant to [*34] secure a judicial order immunizing him from being sanctioned, for performing a particular action, pursuant to any rule where the "purpose" behind the rule (whatever precisely that means) is not a compelling one. n131

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n130. What about the possibility of a hybrid structure, such that constitutional rights<1> are targeted against rules, while constitutional rights<2> protect innocent actions? It might be protested that, by demonstrating that constitutional rights<1> exist - by showing that it can violate X's constitutional rights to sanction him by virtue of an action proscribable under another description - I have not ruled out the existence of constitutional rights<2>. While a hybrid structure is indeed logically possible, it does not describe the case law. The closest cases we have to cases that recognize rights<2> are as-applied challenges to rules. But as I demonstrate below, as-applied challenges to rules are best construed as rule-targeted; they do not involve a complete moral inspection of X's action, and therefore X's successful as-applied challenge does not confer a constitutional right<2> on him. See infra text accompanying notes 140-44.

n131. I am indebted to Michael Dorf for pressing me to recognize and discuss this possibility.

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Although this intermediate sort of constitutional right - one that neither protects a particular action from all rules, nor is targeted against a particular rule - is indeed a logical possibility, it seems morally esoteric. The act-shielding structure, at least, has real moral resonance. Actions are the primary object of moral assessment, at least on certain plausible theories now

widely held by moral philosophers - namely, act-consequentialist or deontological theories. n132 A particular action will, at bottom, be permissibly performed or not, and if our constitutional reviewing courts were epistemically and remedially perfect, they might well focus their efforts on protecting particular actions. But constitutional courts do not do this, presumably because of the formal simplicity and practical advantages of focusing on particular rules. Given that they do not, why think that an intermediate position, with neither the moral resonance of rights-as-shields-for-actions, nor the countervailing benefits of the Basic Structure, is anything more than a logical possibility?

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n132. See supra note 46.

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Given that an intermediate position is both formally complex and morally esoteric, my descriptive efforts here will be brief: the intermediate position does not accurately describe our constitutional practices, any more than the act-shielding structure does. Our very language belies it. Constitutional challenges are characterized as facial or as-applied challenges to particular rules, n133 not to classes of rules. Constitutional courts typically focus on the predicate or history of one particular rule, regardless of whether the constitutional challenge is retrospective or prospective, or whether it is facial or as-applied. Sometimes, constitutional courts will consider, in the same case, a challenge to two or more rules; but it is not a necessary feature

9of constitutional adjudication that this occur. n134 The odd, intermediate position I am briefly considering says that, necessarily, recognizing X's "constitutional right" entails inval [*35] idating a class of rules, rather than just one rule. But constitutional courts typically invalidate (in some measure) merely one, particular rule. This implies that the Basic Structure rather than the intermediate position holds true.

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n133. See Dorf, supra note 38, at 236.

n134. I will not try to demonstrate this exhaustively. But it is true, for example, of the various cases I have selected as doctrinal exemplars, see infra cases cited notes 156-61, 334-41, 348-51, that they typically if not exclusively involve challenges to one rather than multiple rules, on any plausible text-based individuation criterion.

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I should note that the general view of constitutional adjudication presented in this article (that courts repeal or amend rules, not individual treatments), and the arguments generally supporting this view, presuppose only the weaker claim that the act-shielding view is false (that is, that either the Basic Structure or an intermediate structure obtains), and not the more robust claim that the Basic Structure is true. The Direct Account of constitutional rights is unpersuasive because it cannot persuasively account for the following feature of constitutional law, which is a feature both of the Basic Structure and of the intermediate structure just described: that it can be unconstitutional to

impose a sanction or duty pursuant to one rule even though the very action by virtue of which the sanction is imposed, or that the claimant is coerced not to perform, can be sanctioned or coerced pursuant to a different rule. n135

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n135. See infra Part II (criticizing Direct Account). A derivative account of the intermediate structure would construe courts as repealing or amending classes of rules rather than particular rules.

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Nonetheless, because I think the more robust claim is indeed correct, the view of constitutional adjudication presented here, and the arguments advanced to support that view, are specifically framed with the Basic Structure in mind. Constitutional rights are targeted against particular rules, not against classes of rules. n136

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n136. To be sure, a judicial invalidation of one rule may have collateral consequences for other rules. For example, the invalidation may be stare decisis for a subsequent, judicial invalidation of another rule with similar content. The invalidation may even trigger duties, on the part of enforcement officials, to refrain from enforcing other rules. For example, the invalidation of one rule might make it sufficiently "clear" that a second is unconstitutional, such that an enforcement official would no longer possess qualified immunity from a damages action if she were to enforce the second. See generally Kent Greenawalt, Constitutional Decisions and the Supreme Law, 58 U. Colo. L. Rev. 145 (1987) (analyzing consequences of Supreme Court constitutional decisions for legislative and executive officials). Nonetheless, it is a mistake to conceive these collateral consequences as an invalidation of the collaterally- affected rules - or at least to conceive them as the kind of invalidation envisioned by an intermediate structure. The difference between the intermediate structure and the Basic Structure concerns whether a particular rule is targeted by a judicial holding - whether the Court's analytic focus concerns the moral propriety of a particular rule; and, relatedly, whether the change in the duties, powers, etc. of private persons and state officials, with respect to a particular rule, secured by the judicial holding, can be different from the changes that follow from the holding with respect to other rules. But surely the answer is yes, given current practices. For instance, the court can enjoin officials not to enforce the particular rule; it need not enjoin them not to enforce a class of rules. Where such an injunction is entered, official enforcement of the targeted rule can trigger contempt sanctions, under the injunction, while official enforcement of other rules (however similar) will not.

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[*36] What do I mean by "one" particular rule? In saying this, I presuppose some kind of criterion for individuating rules. n137 I will not specify a particular criterion, beyond saying this: the (descriptively) correct individuation criterion is some kind of text-based criterion. Criminal or civil statutes as well as administrative regulations - the kind of rules at stake in this article - have a canonical, written formulation that is part of a canonical "code": the U.S. Code, or the Code of Federal Regulations, or a state

statutory or administrative code. n138 The (descriptively) correct criterion, at least for such rules, must individuate rules along textual lines: as a single deontic sentence, or a single term in a deontic sentence, or a single provision made up of several sentences, or something like that. Why? Because the constitutional courts, in reviewing sanctions and duties, focus on the predicate and history of these sort of textually defined deontic entities. The courts will look at a code provision, or a sentence in that provision, or a bunch of "related" provisions, and so on. n139 "What, precisely, is the correct text-based individuation criterion?" is a tough question; perhaps there is a different criterion for different constitutional clauses. I need not answer that question, for purposes of this Part or indeed this article. My claim is that, whatever the precise, text-based criterion for individuating rules that is descriptively most accurate (or normatively most attractive), the Basic Structure and not some other structure - act- shielding or intermediate - holds true.

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n137. See Schauer, supra note 58, at 62 (discussing individuation of rules); Joseph Raz, Legal Principles and the Limits of Law, 81 Yale L.J. 823, 825-29 (1972) (same); Joseph Raz, Concept of a Legal System 70-92, 140-47 (1980) (same).

n138. See supra note 58 (discussing issue of canonical formulation). For common-law rules without a canonical formulation, the individuation criterion might not be text-based.

n139. This is true, for example, of the doctrinal exemplars, see infra cases cited notes 156- 61, 334-41, 348-51.

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Finally, I should make clear that the Basic Structure does not require constitutional courts to focus exclusively on the predicate or history of the rule pursuant to which an actor is sanctioned or coerced, as opposed to also considering some of the features of his particular action. This goes to the problem of facial versus as- applied challenges, to which I have already alluded. In X's facial challenge to a rule R (whether an anticipatory challenge by which X seeks to free himself of a duty, or a retrospective challenge by which X seeks to overturn a sanction), the court's analysis does focus solely on the predicate and history of R. n140 In X's as-applied [*37] challenge to R, the court's analysis focuses in part on the predicate and history of R, but also in part on some of the features of X's own past or future actions. The Basic Structure is consistent with as- applied challenges, insofar as (a) the court engages in a morally limited, rather than morally complete description of X's own actions; and relatedly (b) X's victory does not entail that those actions are free from sanction under other rules.

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n140. See, e.g., Planned Parenthood v. Casey, 505 U.S. 833, 887-99 (1992) (prospective facial challenge to duty); R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992) (retrospective facial challenge to indictment).

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As-applied challenges, as adjudicated by the Court, fit this description. To give an example: In In re R.M.J. n141 the claimant attorney had been sanctioned, pursuant to a Missouri rule generally prohibiting attorneys from advertising their services, and the Supreme Court then overturned his sanction on free speech grounds. It held that the Missouri rule violated the Free Speech Clause, as applied to the claimant. n142 This meant that the Court analyzed the particular advertisements for which the claimant had been sanctioned: it determined that the advertisements were a form of "commercial speech" and, further, that the advertisements did not have certain properties (being false or misleading) relevant to the purpose behind the Missouri rule. n143 Had the claimant published a false advertisement, his sanction would have been upheld. What the Court did not do was perform a complete moral inspection of the claimant's advertisements; the inspection was limited to the properties that related, either to the liberty of speech, or to the particular rule that Missouri had deployed against the claimant. Presumably, then, he could still be sanctioned for the advertisements if they were sufficiently wrong under another description - for example, if the action of publishing the advertisements constituted an antitrust violation, theft of services, or the breach of a statute regulating the level of wages and prices. The claimant attorney's challenge was as-applied but not act-shielding, and I will further claim that this is generally true of as-applied challenges (at least to sanctions and duties) throughout constitutional law. n144

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n141. 455 U.S. 191 (1982).

n142. See 455 U.S. at 206-07.

n143. See 455 U.S. at 204-07.

n144. The overwhelming majority of the cases in which the Court sustains as-applied challenges arise under the Free Speech Clause, at least for substantive challenges to the kinds of rules discussed in this article. Clear, recent examples of successful as-applied free speech challenges include: Colorado Republican Federal Campaign Commission v. FEC, 518 U.S. 604 (1996); Ibanez v. Florida Department of Business & Professional Regulation, 512 U.S. 136 (1994); Edenfield v. Fane, 507 U.S. 761 (1993); United States v. Eichman, 496 U.S. 310 (1990); Peel v. Attorney Registration and Disciplinary Commission, 496 U.S. 91 (1990); Shapero v. Kentucky Bar Association, 486 U.S. 466 (1988); and United States v. Grace, 461 U.S. 171 (1983). See also Texas v. Johnson, 491 U.S. 397, 404 n.3 (1989) (styled as as-applied challenge, given possibility of nonexpressive flag "desecration"). These are generally consistent with my descriptive claim that as-applied adjudication is not act-shielding, and does not involve a complete moral inspection of the claimant's actions. This is also true of the few clear as-applied challenges that the Court has sustained in the area of substantive due process. See Griswold v. Connecticut, 381 U.S. 479 (1965) (as-applied challenge, insofar as Court relies upon married status of doctors' patients); Carey v. Population Servs. Intl., 431 U.S. 678 (1977) (striking down law restricting distribution and advertisement of contraceptives, as applied to nonprescription contraceptives).

As-applied challenges virtually never arise under the Equal Protection Clause. For the exception that proves the rule, see City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 447-51 (1985); 473 U.S. at 476 (Marshall, J., concurring in the judgment in part and dissenting in part) ("To my knowledge, the Court has never before treated an equal protection challenge to a statute on an as-applied basis.").

As for the Free Exercise Clause: although as-applied challenges were standard prior to the Court's decision in Employment Division v. Smith, 494 U.S. 872 (1990), see Hobbie v. Unemployment Appeals Commn., 480 U.S. 136 (1987); Thomas v. Review Bd., 450 U.S. 707 (1981); Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963), the isomorphism between free exercise and equal protection created by Smith implies that as- applied challenges should become unusual here as well. In any event, there is a reading of the pre-Smith case law that makes it consistent with the Basic Structure - and, given the absence of a complete moral inspection of the religiously motivated actions at stake in Hobbie, Thomas, Yoder, and Sherbert, such is probably the better reading. Pre-Smith type free exercise rights are consistent with the Basic Structure if the successful constitutional claim of a religiously motivated actor against being sanctioned (or, as in Hobbie, Thomas, and Sherbert, being denied benefits) pursuant to neutral Rule<1>, leaves open the possibility that he might be sanctioned (or denied benefits) for the very same action pursuant to another neutral rule (say, a neutral rule justified by a more compelling purpose than the purpose justifying Rule<1>). This is not to say that an act-shielding right to religious liberty is impossible, simply that the pre-Smith cases probably did not create such a right.

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[*38] When and why reviewing courts should engage in as-applied analysis, as opposed to facial analysis, remains a very interesting constitutional question - one that the Direct and Derivative Accounts will answer quite differently. We will consider this question below. n145 My point here is that, whatever the correct answer, the existence of as-applied challenges is quite consistent with the Basic Structure.

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n145. See infra text accompanying notes 414-21.

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*** The Basic Structure is our structure. It holds true of as-applied challenges as well as facial challenges, in anticipatory suits as well as retrospective suits, and across the wide terrain of the Bill of Rights - from free speech to equal protection to free exercise to substantive due process. Perhaps morality requires this structure to change; but I will not pursue that issue in this article. n146 For there is a morally tenable account of the moral content of constitutional rights, structured the way those rights are. That is the Derivative Account. Rule-targeted rights are best construed, and plausibly construed, as morally derivative rights. The Direct Account is a poor view of rule-targeted rights; the Derivative Account is a much [*39] better view. These are normative, not descriptive claims, and the time has come to defend them.

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n146. The question is whether the legal institution or practice of act-shielding rights is morally preferable to the Basic Structure. See infra text accompanying note 427 (discussing this issue).

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II. The Direct Account

Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court. A closely related principle is that constitutional rights are personal and may not be asserted vicariously. These principles rest on more than the fussiness of judges. They reflect the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws. Constitutional judgments, as Mr. Chief Justice Marshall recognized, are justified only out of the necessity of adjudicating rights in particular cases between the litigants brought before the Court n147

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n147. Broadrick v. Oklahoma, 413 U.S. 601, 610-11 (1973) (citations omitted).

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This is the official view of constitutional rights - the view that the Court officially espouses. n148 This view sees constitutional rights as essentially "personal," in the following sense: X's constitutional right secures judicial protection, for X, against the application of a particular rule R to him. If applying rule R to X is morally unproblematic, then X has no constitutional claim; the Constitution does not empower X to secure a judicial invalidation (a repeal or amendment) of the rights-targeted rule, merely because the rule does wrong to other persons within the rule's scope. In the Court's words: "[A] person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others." n149 To construe the Constitution as empowering X to trigger a judicial invalidation of rules that merely do wrong to some persons, but not to X himself, would make reviewing courts into mini-legislatures - "roving commissions assigned to pass judgments on the validity of [*40] the Nation's laws" n150 - rather than adjudicatory bodies essentially concerned with the treatment of particular litigants.

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n148. The Court has numerous times made statements similar to the above-quoted statement from Broadrick, particularly in the context of explicating the overbreadth doctrine. See, e.g., Osborne v. Ohio, 495 U.S. 103, 112 n.8 (1990); Massachusetts v. Oakes, 491 U.S. 576, 581 (1989) (plurality

opinion); Board of Airport Commrs. v. Jews for Jesus, Inc., 482 U.S. 569, 573 (1987); Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 501 (1985); Secretary of State v. Joseph H. Munson, Co., 467 U.S. 947, 955 (1984); New York v. Ferber, 458 U.S. 747, 767 (1982); see also United States v. Salerno, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."). Salerno's rule, clearly, trades upon the "personal" view of constitutional rights articulated by the Court in Broadrick and the other cases here cited.

n149. Broadrick, 413 U.S. at 610.

n150. 413 U.S. at 611.

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The Direct Account encapsulates and formalizes this official view of constitutional rights.

Direct Account

To say that some treatment of X (sanctioning X pursuant to a rule, or subjecting X to the duty that the rule announces) "violates X's constitutional rights" entails the following: the treatment is directly wrong, and X has the legal right to secure judicial invalidation of the treatment. "Directly wrong" means that there is sufficient moral reason for the court to invalidate the treatment (overturn X's sanction, or free X from the duty), quite independent of any further invalidation of the rule under which the treatment falls.

Is this account morally tenable? I think not. This Part considers, and criticizes, the possible defenses of the Direct Account. I analyze, and reject, a variety of purported explanations why moral reason might obtain for a court to overturn X's own treatment, independent of further invalidating the rule under which that treatment falls. n151 For purposes of clarity and rigor, I discuss separately the two kinds of legal treatments that are at issue in this article: sanctions and duties. My strategy will be to rebut, first, the possible explanations why the Direct Account holds true of sanctions. n152 Then, at the end of this Part, I discuss whether moving from sanctions to duties helps the Direct Account. n153

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n151. In advancing this criticism, I do not mean to deny the plausibility of deontological or agent-relative moral constraints: for example, the plausible constraint upon killing one person even to save five. See, e.g., Scheffler, supra note 17, at 80-114 (critically discussing agent-relative constraints). What the Direct Account tries to advance is an agent-relative, or quasi-agent-relative, view of the moral content of constitutional rights: a purported moral reason to save the claimant, independent of what happens to anyone else. My claim is not the generic claim that moral views of this sort are implausible; rather, it is the specific claim that, given the proscribability of rights-holders' actions under other descriptions, the Direct Account won't fly for the constitutional rights I discuss.

n152. See infra sections II.A, B, C.

n153. See infra section II.D.

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To assess the Direct Account I use the following simple and stylized examples of constitutional rights. The examples are meant to reflect the range of substantive constitutional rights that sanctions, and the duties that sanctions back up, can violate. n154 I draw the [*41] rule in each example, more or less directly, from a major Supreme Court case or cases under the Bill of Rights. And the stylized facts are designed to highlight the Basic Structure of constitutional rights: that constitutional rights function as shields against particular rules, not shields around particular actions. n155

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n154. With one exception: a right against vagueness. Vagueness may provide a viable challenge to a conduct-regulating law that is otherwise constitutional. See Kolender v. Lawson, 461 U.S. 352, 352 (1983) (striking down, on vagueness grounds, a statute that required loiterers to provide, upon request by a peace officer, a "credible and reliable" identification). But the moral import of vagueness is sufficiently distinct from, say, the moral import of a clear law regulating speech, or abortion, see Lon Fuller, The Morality of Law 39 (1969) (listing a total "failure to make rules understandable," along with a failure to publicize rules, retroactivity, and several others, as a failure to maintain a legal system at all), that I leave for another day the question whether a Direct Account of vagueness succeeds.

n155. To avoid misunderstanding, let me emphasize that the stylized facts in these examples are not drawn from particular cases. I am aware of free-speech cases where the successful claimant was, in fact, a wrongdoer under another description. See cases cited supra note 66, 85-87. I am not aware of equal protection, free exercise, or substantive due process cases where that was true, in part, no doubt, because of the facial character of constitutional adjudication in these latter areas. See supra note 144; infra notes 554-57 and accompanying text. Nonetheless, as I have argued at some length, the successful equal protection, free exercise, and substantive due process claimant, as well as the successful free speech claimant, could be a wrongdoer under another description. Nothing in his having a successful constitutional claim entails otherwise, and these stylized facts are designed to illustrate that. If you deny that a claimant with these particular facts would have a successful claim (on the Derivative Account, because the Court would amend the rule but leave the claimant's action covered by the amended rule, see infra text accompanying notes 414-21), simply substitute a different kind of wrongdoing plaintiff. Some wrongdoing plaintiff must have a successful claim, if constitutional rights are not act-shielding.

It might be objected that the Basic Structure (X's valid constitutional claim does not protect him from being sanctioned under a different description) is, strictly, consistent with the following: X's valid constitutional claim does entail that X is not (the Court predicts) sanctionable under a different description. This is strictly consistent with the Basic Structure if, when the court's prediction is proven wrong, the claimant is not protected, by judicial order, from the latter sanction. However, I see nothing in existing free